UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN D. WEST, on behalf of himself and all others similarly situated,

Plaintiff-Appellee,

v.

AK STEEL CORPORATION (formerly Armco Inc.) RETIREMENT ACCUMULATION PENSION PLAN and AK STEEL CORPORATION BENEFIT PLANS ADMINISTRATIVE COMMITTEE,

Defendants-Appellants.

No. 06-3442

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati.
No. 02-0001—Sandra S. Beckwith, Chief District Judge

Argued: March 16, 2007

Decided and Filed: April 20, 2007

Before: COLE, CLAY, and GILMAN, Circuit Judges.

RONALD LEE GILMAN, Circuit Judge. This is a class action lawsuit brought by early retirees in the AK Steel Corporation Retirement Accumulation Pension Plan (AK Steel Plan) who elected to receive their pension benefits under the Plan in the form of a lump-sum payment. The AK Steel Plan is a cash balance plan specifying that participants can elect to receive a lump sum equal to their "account balance" at the termination of employment rather than hav-

ing to wait until they reach the normal retirement age of 65. According to the plaintiffs, the AK Steel Plan's failure to use what is known as the "whipsaw calculation" when determining the value of the lump-sum distributions for these early retirees caused a forfeiture of benefits in violation of the Employment Retirement Income Security Act (ERISA).

The district court, in April of 2004, granted partial summary judgment in favor of the plaintiffs on the issue of liability. A year and a half later, the district court awarded the plaintiffs over $37 million in damages and more than $9 million in prejudgment interest. AK Steel timely appealed. For the reasons set forth below, we AFFIRM the judgment of the district court.

I. BACKGROUND

A. The AK Steel Plan

ERISA specifies that employee benefit plans are subject to "minimum standards . . . assuring the equitable character of such plans and their financial soundness." ERISA § 2(a), 29 U.S.C. § 1001. Under ERISA, a pension plan is either a defined contribution plan or a defined benefit plan. ERISA §§ 3(34), 3(35), 29 U.S.C. § 1002 (34), (35). A defined contribution plan "provide[s] for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account . . . ." ERISA § 3(34), 29 U.S.C. § 1002 (34). In other words, an employee's retirement benefit is the eventual value of his or her account to which contributions have been made by the employer and/or the employee.

Any other type of pension plan is a defined benefit plan. ERISA § 3(35), 29 U.S.C. § 1002(35). Under a defined benefit plan, an employee's benefit is an amount, either in the form of an annuity or a lump-sum payment, equal to a specified percentage of the employee's salary in the final years of his or her employment. The AK Steel Plan at issue in the present case is a hybrid of both a defined contribution plan and a defined benefit plan known as a "cash balance plan," but is classified under ERISA as a defined benefit plan.

"A cash balance plan is a defined benefit plan that possesses many of the characteristics of a defined contribution plan." Robert Rachal, Russell L. Hirschhorn & Nicole Eichberger, *Cases and Issues in Cash Balance Plan Litigation*, 22 Lab. Law. 19, 21 (2006). Cash balance plans mimic traditional defined benefit plans in that participants do not typically make any contributions. *Id.* Like defined contribution plans, however, a cash balance plan creates an account for each participant. But unlike traditional defined contribution plans, the account is hypothetical and created only for recordkeeping purposes. *Id.*

The hypothetical account on paper looks much like a traditional 401(k) account. *Id.* at 22. "This account balance is made up of two components: (i) a pay credit (*e.g.*, 3% of pay per year); and (ii) an interest credit on the account balance, which may be fixed or variable and tied to some index." *Id.* If these interest credits are tied to an average rate of return on investments in the stock market, for example, the employer bears any "investment risk" by agreeing to credit the participant's account at that market rate. Even if the employee ceases working for the plan

sponsor, interest credits continue to accrue to the employee's hypothetical account until he or she begins receiving pension benefits. When an employee reaches the normal retirement age of 65, the pension benefit is the value of this hypothetical account balance. The employee can usually choose whether the benefit is distributed in the form of a single-life annuity or a lump-sum disbursement.

In the present case, the AK Steel Plan provides for two different types of cash balance accounts: Opening Accounts and Future Accounts. Opening Accounts represent the lump-sum value of the retirement annuity that an employee had earned under AK Steel's prior benefit formula as of January 1, 1995. The Opening Accounts grow at a minimum interest rate of 7.5% per year. Future Accounts keep track of benefits earned after January 1, 1995, the date on which AK Steel converted its previous traditional pension benefit plan to a cash balance plan. The Future Accounts receive pay credits at a rate of between 3% and 12% per year, calculated according to a chart that factors in both the participant's age and continuous years of service as of December 31, 1994, multiplied by an applicable percentage of pay that is periodically set by AK Steel. For example, a Plan participant who was 39 years old on December 31, 1994 and had six continuous years of service as of that date would receive pay credits at the rate of 3% of earnings. A Plan participant who was 55 years old on that date, in contrast, with the same years of service, would receive pay credits at a rate of 5% of earnings. Interest credits on Future Accounts are tied to the rate of return on U.S. Treasury securities.

The AK Steel Plan provides that

> [s]ubject to the minimum protected benefits described in Section 4.8, a Participant may Retire on or after his Normal Retirement Date and receive a . . . Benefit payable in accordance with Article VI in one of the following payment options: (a) Full lump-sum payable on his Benefit Commencement Date equal to his Accounts; (b) Full annuity beginning on his Benefit Commencement Date equal to the Actuarial Equivalent of his Accounts; or (c) Partial lump-sum and partial annuity payable or beginning on his Benefit Commencement Date equal to the respective pro-rata amounts determined under (a) and (b) above.

AK Steel Plan § 4.1. A participant who takes early retirement, subject to certain conditions not relevant to this appeal, may also elect to receive his or her pension benefit in any of the above-mentioned payment options. AK Steel Plan § 4.2.

Section 4.8 of the AK Steel Plan, titled "Minimum Protected Benefit," states that "no Participant shall have a . . . benefit that is less than the actuarial equivalent of his accrued benefit determined under the terms of the [prior plan]. . . ." "Accrued Benefit" is defined by the Plan as

> the Accounts payable in the form of a single life annuity commencing on a Participant's Normal Retirement Date (or, if later, such Participant's actual retirement date) that is the Actuarial Equivalent of the Participant's current

> Account. The Account is projected to Normal Retirement Date and converted to a single life annuity using the factors set forth in Exhibit I. This single life annuity shall be determined by dividing the then current value of such Participant's Account by the applicable factor as described in Section A of Exhibit I.

Another key provision of the AK Steel Plan is § 1.2, which tracks the language of ERISA. Section 1.2 defines a participant's accrued benefit under a defined benefit plan as an "individual's accrued benefit determined under the plan . . . expressed in the form of an annual benefit commencing at normal retirement age." ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A).

The Internal Revenue Service (IRS) issued a determination letter in November of 1996 that approved the AK Steel Plan. As part of its application, the AK Steel Plan expressly stated that an employee electing a lump-sum distribution of benefits would receive a payment equal to his or her account balance.

B. Whipsaw calculation

The most litigated aspect of cash balance plans has proven to be the so-called "whipsaw calculation." This calculation arises when participants opt to "cash out" their hypothetical accounts before they reach normal retirement age. To comply with ERISA, lump-sum payments such as the ones received by the plaintiffs in the present case must be the actuarial equivalent of the normal accrued pension benefit. *See Berger* v. *Xerox Corp. Ret. Income Guar. Plan*, 338 F.3d 755, 759 (7th Cir. 2003) (citing 29 U.S.C.

§ 1054(c)(3)). The actuarial equivalent is calculated in two steps. First, a participant's hypothetical account balance is projected forward to normal retirement age -- in the AK Steel Plan, age 65 -- using the rate at which future interest credits would have accrued if the participant had remained in the AK Steel Plan until that time. Second, that projected amount is discounted back to its present value on the date of the actual lump-sum distribution.

If the interest rate used in Step 1 is greater than the discount rate used in Step 2, the amount of the participant's lump-sum disbursement will be larger than his or her hypothetical account balance. This two-step process is commonly referred to as the "whipsaw calculation." In the present case, Opening Accounts receive interest credits at a minimum annual rate of 7.5%, while the statutory discount rate for calculating the present value of a lump-sum distribution has been invariably lower (5.1% in 2002, for example). This causes the value of the pension benefit under the whipsaw calculation to be greater than the simple value of the account balance at the time of the lump-sum distribution. The IRS provides a useful example of the whipsaw effect:

> A cash balance plan provides for interest credits at a fixed rate of 8% per annum that are not conditioned on continued employment, and for annuity conversions using the [Internal Revenue Code §] 417(e) applicable interest rate and mortality table. A fully vested employee with a hypothetical account balance of $45,000 terminates employment at age 45 and elects an immediate single

> sum distribution. At the time of the employee's termination, the Section 417(e) applicable interest rate is 6.5%.
>
> The projected balance of the employee's hypothetical account as of normal retirement age is $209,743. If $209,743 is discounted to age 45 at 6.5% (the Section 417(e) applicable interest rate), the present value equals $59,524.
>
> Accordingly, if the plan paid the hypothetical account balance of $ 45,000, instead of $ 59,524, the employee would receive $ 14,524 less than the amount to which the employee is entitled.

IRS Notice 96-8, 1996-1 C.B. 359.

The plaintiffs argue that ERISA mandates the whipsaw calculation -- in other words, a payout of $59,524 in the example cited above -- and that AK Steel's failure to calculate lump-sum distributions in this manner constitutes a statutory violation of ERISA. AK Steel responds by arguing that, under the plain language of the AK Steel Plan, the plaintiffs received exactly the lump-sum distribution to which they were entitled -- the value of each participant's hypothetical account at the date of termination ($45,000 in the example above).

C. Pension Protection Act of 2006

Cash balance plans are typically designed to pay accrued benefits to participants upon the termination of their employment. *Rachal, Hirschhorn & Eichberger*, 22 Lab. Law. at 27. "ERISA, however, was not designed with cash balance plans in mind and, instead, is premised on the notion that in a de-

fined benefit plan, the benefit due is an annuity beginning at the normal retirement age, typically age sixty-five." *Id.* Until August of 2006, ERISA enforced this annuity obligation through several interrelated provisions. *Id.* at 20, 27. The net result of this enforcement scheme was that a cash balance plan such as the AK Steel Plan would be required to use the whipsaw calculation in order to comply with ERISA. *See id.* at 27.

Partly to address the treatment of cash balance plans under the ERISA statutory scheme, Congress passed the Pension Protection Act (PPA) of 2006. Pub. L. No. 109-280, 120 Stat. 780 (2006). The PPA created special rules for cash balance plans, among them the provision that defined benefit plans shall not be treated as failing to meet the requirements of ERISA solely because the present value of an accrued benefit is deemed equal to the amount expressed as the balance in a participant's hypothetical account. PPA § 701(a)(2). These rules apply to distributions made after August 17, 2006. PPA § 701(e)(2). In effect, the PPA establishes on a prospective basis that the whipsaw calculation is not required.

D. Procedural history

John West was employed by Armco, Inc. from October 1966 until his retirement from the company in August of 1997 at the age of 57. He was a participant in the Armco, Inc. Retirement Accumulation Pension Plan, a part of the Armco, Inc. Noncontributory Pension Plan. Upon taking early retirement, West elected to receive his pension benefits in a lump-sum distribution. He signed a benefit-election form acknowledging that he understood his payment

options, and that he was making a fully informed decision to receive his benefits in the form of a lump-sum distribution equal to his account balance. In September of 1999, Armco, Inc. merged with AK Steel. The original Armco retirement plan, in which West was a participant, became part of the AK Steel Plan.

West submitted an administrative claim to the AK Steel Plan administrators in September of 2000 that challenged the amount of his lump-sum benefit. He argued that the lump-sum benefit he received was not the actuarial equivalent of the benefit that he would have been entitled to at age 65 because it did not account for the interest credits that would have continued to accumulate under the terms of the AK Steel Plan if he had waited until the age of 65 to collect his benefits. The AK Steel Plan Committee rejected his administrative claim as untimely and, with regard to the merits, ruled that West had received all of the benefits due to him under the terms of the AK Steel Plan.

In January of 2002, West filed suit on behalf of himself and all others similarly situated, claiming that this alleged underpayment of benefits violated ERISA. The district court certified the class in March of 2004. A month later, the district court granted West's motion for partial summary judgment on the issue of liability. After denying a subsequent motion by AK Steel to dismiss West's claim as time-barred, the district court awarded damages of over $37 million to the class together with prejudgment interest. AK Steel timely appealed.

II. ANALYSIS

A. Standard of review

We review the district court's grant of summary judgment under the de novo standard. *Tatis* v. *U.S. Bancorp*, 473 F.3d 672, 674 (6th Cir. 2007). That same standard applies to our review of the district court's interpretation of a statute. *United States* v. *Tudeme*, 457 F.3d 577, 580 (6th Cir. 2006). The district court's decision of whether to apply the Plan requirement that ERISA plaintiffs must exhaust their administrative remedies before filing suit in federal court is reviewed under the abuse-of-discretion standard. *Costantino* v. *TRW*, Inc., 13 F.3d 969, 974 (6th Cir. 1994).

B. Jurisdiction under ERISA to grant the relief requested

Section 502(a)(1)(B) of ERISA authorizes a participant or beneficiary of a benefit plan to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." ERISA § 502(a)(3), on the other hand, authorizes a participant, beneficiary, or fiduciary of a benefit plan to bring a civil action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations, or (ii) to enforce any provisions of this subchapter or the terms of the plan."

West's complaint tracks the language of both § 502(a)(1)(B) and § 502(a)(3):

> This is a class action to enforce, and to redress violations of [ERISA]. The action is brought on behalf of participants in an ERISA-qualified pension plan to recover benefits due them under the terms of the plan, to enforce their rights under the terms of the plan, to clarify their rights to future benefits under the terms of the plan, and to redress violations of ERISA.

The prayer for relief requests damages to remedy the alleged underpayment of benefits due to how the lump-sum distribution was calculated under the AK Steel Plan. AK Steel argues that neither prong of the ERISA enforcement scheme authorizes the relief that the plaintiffs seek. We will analyze the two statutory provisions in reverse order.

1. Equitable relief under § 502(a)(3)

AK Steel argues, and we agree, that the plaintiffs cannot recover the relief they request under ERISA § 502(a)(3). Any doubt on this point was eliminated by this court's decision in *Crosby* v. *Bowater, Inc. Ret. Plan*, 382 F.3d 587 (6th Cir. 2004). The plaintiff in *Crosby*, a retirement plan participant, argued that the plan administrator's use of a preretirement mortality discount factor in the whipsaw calculation of lump-sum preretirement benefits constituted a statutory violation of ERISA. *Id.* at 589. As a result, Crosby alleged that he and similarly situated plan participants were paid a benefit that fell short of the amount that they were legally entitled to receive. *Id.* "At the heart of the plaintiff's prayer for relief was a request for recovery of additional lump sum benefits." *Id.* The complaint requested "equita-

ble and injunctive relief." *Id.* Unlike in the present case, however, *Crosby* specifically argued that he was precluded from bringing a claim under § 502(a)(1)(B). *Id.* at 591 n.5. The court "intimate[d] no view as to whether [that] proposition is correct." *Id.*

Crosby argued that the relief he requested was an appropriate equitable remedy because he did not seek to impose liability for a contractual monetary obligation. *Id.* at 592-93. This court, in rejecting his argument, began its analysis by noting that the Supreme Court has held that equitable relief refers to the categories of relief traditionally available in a court of equity-namely, injunction, mandamus, and restitution, but not compensatory damages. *Id.* at 594. Lawsuits seeking to compel the defendant to pay a sum of money, on the other hand, almost invariably are suits for money damages, the classic form of legal relief. *Id.* at 594. The court therefore held that ERISA § 502(a)(3) "does not, in most situations, authorize an action for money claimed to be due and owing." *Id.* at 589.

Unlike *Crosby*, the plaintiffs in the present case expressly brought their claims under both § 502(a)(3) and § 502(a)(1)(B). The prayer for relief, however, centers on money damages for the alleged underpayment of a benefit. Although the plaintiffs also request unspecified "other relief as may be deemed just and equitable," that phrase is found in the portion of the complaint requesting costs and attorney fees. This is insufficient to assert a proper equitable claim under § 502(a)(3) where the "heart of the plaintiff's prayer for relief was a request for recovery of additional lump sum benefits." *Crosby*, 382 F.3d at 589.

The plaintiffs in the present case have already "cashed out" of their participation in the Plan, so traditional forms of equitable relief -- injunction, mandamus, or restitution -- would not redress their claim. Because the plaintiffs' claim in the present case is essentially one for money damages, we conclude that Crosby forecloses their claim to the extent that they rely on § 502(a)(3). *See id.* at 589 ("For the district court to order the defendants "to refund" (*i.e.* to pay) the difference between the amount calculated without a mortality discount and the amount actually received was to grant a form of relief not typically available in equity."); *see also Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 210, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002) ("[S]uits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for money damages, as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty.") (citation and quotation marks omitted).

2. Damages under § 502(a)(1)(B)

West received his lump-sum payment in August of 1997. At that time, he executed a benefit-election form acknowledging that he understood his options and that he was making a fully informed choice of a lump-sum payment equal to his hypothetical account balance. He did not submit an administrative claim disputing the amount of the lump-sum payment until September of 2000. That claim was dismissed as untimely. Section 2.15(f) of the AK Steel Plan states that any claim questioning the amount of the benefit will be rejected unless it is

filed within 90 days from the date of the first payment, subject to a showing of extenuating circumstances for the failure to timely file. Moreover, that section specifies that a "claimant who does not submit a written claim or request for review within the time limitations specified above shall be deemed to have waived and abandoned any such claim or right of review except with the express written approval of and in the discretion of the Committee."

AK Steel moved for the entry of judgment on West's claim, arguing that the claim had been untimely filed. The motion was not based on the theory that the statute of limitations on West's right to bring suit had expired, but rather that he had failed to seek timely administrative review as specified by the Plan. Concluding that West had not waived his legal claim under ERISA and that he was not required to first exhaust his administrative remedies, the district court denied the motion. The court concluded that resort to the administrative process would have been futile because the AK Steel Committee would have simply recalculated the benefits under the method outlined in the AK Steel Plan, resulting in the same benefit amount. It found that West's futility argument is based on his position that the provisions of the AK Steel Plan violate ERISA and the Internal Revenue Code and that no amount of administrative review would alter the calculation of benefits under the current terms of the plan.

On appeal, AK Steel argues that West cannot proceed under § 502(a)(1)(B) because he has already received all of the benefits he was due under the terms of the plan. It contends that he is now barred from bringing his damage claim for a statutory viola-

tion of ERISA because West had to "concede" that he received all of the benefits due him under the terms of the Plan in order to successfully argue that he came within the futility exception to ERISA's exhaustion requirement.

We respectfully disagree. To rule in favor of AK Steel on this ground would present future plaintiffs who would otherwise qualify for the futility exception to the exhaustion requirement with an untenable dilemma -- having to concede their claim on the merits in order to survive a motion to dismiss for failure to exhaust administrative remedies. AK Steel, in our view, oversimplifies West's argument in an attempt to strip him of any remedy for the alleged violation of ERISA. As the district court aptly stated:

> Here, Plaintiffs contend that they are entitled to additional lump sum benefits under the terms of the Plan, because the Plan's treatment of lump sum payments violates ERISA. To accept Defendant's argument that Plaintiffs cannot bring any claim, would in effect permit plan terms that blatantly violate ERISA to stand unchallenged, because once the benefits were paid, participants could not bring a claim under § 502(a)(1)(B) for benefits "under the terms of the plan."

Exhaustion here would have been futile because, under the AK Steel Plan, a lump-sum distribution is described as a payment equal to the participant's account balance. Had West submitted a timely claim for the recalculation of his lump-sum benefit, the AK Steel Committee would simply have

responded, as it has argued in this appeal, that West has already received an amount equal to his account balances, which is all that he is entitled to under AK Steel's interpretation of its Plan. The district court thus did not abuse its discretion in concluding that the exhaustion requirement does not apply in this case. *See Fallick* v. *Nationwide Mut. Ins. Co.*, 162 F.3d 410, 420 (6th Cir. 1998) ("[W]hen resort to the administrative review process would be an exercise in futility, the exhaustion of remedies doctrine shall not apply.").

Although AK Steel has a point that § 502(a)(1)(B) offers redress only for the recovery of benefits, enforcement of rights, or clarification of rights to future benefits under the terms of the Plan, those terms must nevertheless comply with ERISA. As will be discussed in greater detail below, the key issue is whether West was paid less than the full accrued benefit due him under the AK Steel Plan because of his election to receive that accrued benefit as a lump sum rather than as a traditional annuity. AK Steel concedes that the accrued benefit cannot be forfeited due to the form of distribution without violating ERISA.

Our conclusion that ERISA § 502(a)(1)(B) provides an appropriate remedy is bolstered by other cases in which plaintiffs have been allowed to proceed on similar claims. *See Esden* v. *Bank of Boston*, 229 F.3d 154, 161-62 (2d Cir. 2000) (allowing a class action under ERISA § 502(a)(1)(B) for unpaid benefits in a cash balance plan where the plan specified that lump-sum payments were equal to the amount in the participant's hypothetical account); *Laurent* v. *PriceWaterhouseCoopers LLP*, 448 F. Supp. 2d 537,

540 (S.D.N.Y. 2006) (denying the plan sponsor's motion to dismiss the plaintiffs' claim that the cash balance plan's provision for calculating lump-sum benefits violated ERISA because the balance payable under the terms of the plan was an amount less than the actuarial value of the accrued benefits); *see also Met. Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 63, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987) (describing ERISA § 502(a)(1)(B) as the "exclusive federal cause of action" for recovering benefits from a covered plan).

C. Whipsaw calculation and ERISA compliance

AK Steel argues that neither ERISA nor the Internal Revenue Code (IRC) require the whipsaw calculation adopted by the district court. The district court held that, in order to calculate a participant's lump-sum payment, the participant's hypothetical account balance must be (1) projected forward at AK Steel Plan's specified interest rates into a life annuity beginning at age 65, and then (2) discounted back at the lower statutory rates (prescribed by ERISA and the IRC) to a lump-sum present value. AK Steel argues that it is entitled to use the same statutory rate for both steps of the calculation. If so, the calculation would be a wash and the lump-sum payout would always equal the participant's hypothetical account balance at the time of distribution.

1. Prior caselaw dealing with the whipsaw calculation and cash balance plans

Three other circuits have addressed the issue of whether the whipsaw calculation is required for a lump-sum payout from a cash balance plan where a participant can retire prior to normal retirement age. These three cases are as follows:

a. *Lyons* v. *Georgia-Pacific Corp. Salaried Employees Retirement Plan*

In *Lyons* v. *Georgia-Pacific Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235 (11th Cir. 2000), a plan participant could elect to receive his or her "accrued pension benefits in an optional lump sum form, payable immediately, rather than as an annuity commencing at age 65." *Id.* at 1238. "If the participant elects this option, the amount payable under the Plan is a single sum equal to the amount in the participant's Personal Account (the hypothetical bookkeeping account)." *Id.* at 1238-39. Just like West in the present case, Lyons sued for the underpayment of benefits, alleging that the amount Georgia-Pacific distributed to him was substantially less than what he was entitled to receive under ERISA § 203(e), as interpreted by Treas. Reg. 1.411(a)-11 (which "restricts the ability of defined benefit plans to distribute any portion of a participant's accrued benefit in optional forms of benefit without complying with specific valuation rules for determining the amount of the distribution") and Treas. Reg. 1.417(e)-1 (which requires a minimum lump sum payable from a defined benefit plan to be at least equal to the present value of the participant's normal retirement benefit). *Id.* at 1239. The annual amount of interest added to Lyon's hypothetical account as specified in the Georgia-Pacific Plan (used in Step 1 of the whipsaw calculation) was higher than the maximum discount rate (used in Step 2 of the whipsaw calculation to determine the present value of the projected age-65 annuity) prescribed by ERISA § 203(e). *Id.* at 1241.

Agreeing with Lyons, the Eleventh Circuit held that he should benefit from the whipsaw calculation. The Lyons court succinctly stated the issue: "If the plan had pegged the interest credit rate to the prescribed maximum discount rate, there would have been no difference (regardless of the time factor), and no dispute. But it did not, so there is a dispute." *Id.* at 1241.

Treas. Reg. 1.411(a)-11, which sets forth the same discount restrictions on calculating the present value of lump-sum distributions as ERISA § 203(e), specifies "that the present value of any optional form of benefit (a lump sum payout is an optional form of benefit), cannot be less than the present value of the participant's normal retirement benefit." *Id.* at 1244. The Lyons court held that, "[u]nlike a defined contribution plan, the accrued benefit under this Plan is not the amount in the Participant's Personal Account, but rather an amount derived from that hypothetical account." *Id.* at 1251 (emphasis in original). In contrast to the AK Steel Plan, the Georgia-Pacific Plan itself required the whipsaw calculation:

> To determine the normal retirement amount Lyons would have received at age 65, the Plan specifies that his hypothetical account balance must be projected forward using the interest credit rates set forth in the Plan. It is the Plan itself, rather than the Treasury regulations, that require the hypothetical account balance to be projected forward using the credit interest rate, and it is the Plan itself that specifies the interest credit rate to be applied for that pur-

> pose. What the Treasury regulation adds is that once the normal retirement benefit is ascertained in accordance with the Plan, that amount is then to be discounted to present value using the [Pension Benefit Guaranty Corporation (PBGC)] rate [prescribed by ERISA § 203] in order to calculate the lump sum distribution to which the participant is entitled.
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> * * *
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> Distribution of the hypothetical account balance alone is not enough where, as here, the interest credit rate exceeds the [PBGC] rate.

Id. at 1252.

b. *Esden* v. *Bank of Boston*

The Bank of Boston amended its plan in 1989 to become a cash balance plan. *Esden* v. *Bank of Boston*, 229 F.3d 154, 159 (2d Cir. 2000). Like the present case, the Bank of Boston Plan provided that whenever a participant elected a lump-sum distribution, the benefit received would be equal to the balance of the participant's hypothetical account. *Id.* at 161. Esden elected to take a lump-sum benefit at the time she terminated her employment in the amount of $1,533.98. *Id.* at 160. This was the balance in her hypothetical account at that time. *Id.* Had Esden waited until the age of 65 to cash out her plan, she would have been entitled under the terms of the Plan to a minimum accrued benefit of $7,086.83 -- the projected lump-sum amount of her account at age 65, assuming a minimum guaranteed interest credit of

5.5%. *Id.* at 160-61. At the time of her termination, that projected age-65 annuity benefit had a present value of $1,595.52 (slightly more than what she received). *Id.* at 161. Esden argued that she received less than what the law requires under ERISA. *Id.* at 162.

The Bank of Boston contended, as does AK Steel in the present case, that Esden received all that she was promised under the explicit terms of the plan, and that any additional payout would constitute a windfall at the expense of the other Plan participants. *Id.* Agreeing with Esden, the Second Circuit concluded that the "Plan does not comply with the statutory and regulatory requirements, or with their authoritative interpretation issued by the IRS." *Id.* at 162. Moreover, it concluded, "the IRS's interpretation of how the existing regulations apply to cash balance plans is reasonable and consistent." *Id.* The court summarized the relevant ERISA and IRC requirements for pension distribution in less-technical language:

> What these provisions mean . . . is that: (1) the accrued benefit under a defined benefit plan must be valued in terms of the annuity that it will yield at normal retirement age; and (2) if the benefit is paid at any other time (*e.g.*, on termination rather than retirement) or in any other form (*e.g.*, a lump sum distribution, instead of annuity) it must be worth at least as much as that annuity.
>
> This rule that regardless of any option as to timing or form of distribution, a vested participant in a defined benefit

> plan must receive a benefit that is the actuarial equivalent of her normal retirement benefit (that is, the accrued benefit expressed as an annuity beginning at normal retirement age) has been repeatedly recognized by courts.

Id. at 163 (emphasis added) (citations omitted).

The court in *Esden* concluded that the Bank of Boston could not use the same rate in both Step 1 and Step 2 of the whipsaw calculation without working an impermissible forfeiture in violation of ERISA. *Id.* at 165-66 ("Either the plan must have employed a discount rate equal to the interest credit rate, and by hypothesis in excess of the prescribed 'applicable rate,' in violation of Code section 417(e) and ERISA section 205(g); or the plan must have projected the cash account balance forward at a rate less than the interest credits provided under the plan, thereby working a forfeiture under Code section 411(a)(2) and ERISA § 203(a)(2).") (relying on IRS Notice 96-8). The fact that Esden received exactly what she was promised under the terms of the plan was deemed irrelevant because the "issue is whether the Plan's terms complied with the law." *Id.* at 172. As the court observed, "[t]he Plan cannot contract around the statute." *Id.* at 173.

c. *Berger* v. *Xerox Corp. Retirement Income Guarantee Plan*

In 2003, the Seventh Circuit affirmed a $300 million class action judgment against Xerox for underpayments made to participants in its cash balance pension plan who elected to take a lump-sum payout upon termination of employment. *Berger* v. *Xerox Corp. Ret. Income Guar. Plan*, 338 F.3d 755,

757-58 (7th Cir. 2003). Xerox's plan entitled the "departing employee not to the balance in his (hypothetical) account, but to the balance when he receives the 'distribution' of his pension benefit." *Id.* at 758-59. The Xerox Plan computed lump-sum distributions paid out before normal retirement age under the whipsaw calculation, but because it used identical interest rates in both steps of the calculation, the result always equaled the participant's cash balance on the date of his or her departure. *Id.* at 760.

What Xerox did is exactly what AK Steel argues is the proper approach in the present case. But just as in *Lyons*, *Esden*, and the present case, the interest credit rate specified in the Xerox Plan was higher than the statutory discount rate. *See id.* The whipsaw-calculation issue was thus squarely before the *Berger* court.

ERISA, said the court, mandates that any lump-sum substitute for an accrued pension benefit must be the actuarial equivalent of that benefit. *Id.* at 759 (citing 29 U.S.C. § 1054(c)(3)). The Seventh Circuit held that future interest credits are part of a participant's accrued benefit. *Id.* A participant in the Xerox Plan had an "absolute, vested, indefeasible entitlement . . . to a pension at age 65 based on his cash balance as increased by future interest credits accruing between his departure and his reaching that age, provided only and obviously that he does not demand an earlier distribution." *Id.* Because that pension entitlement is an accrued benefit under the plan, any lump-sum distribution occurring before the participant reaches the age of 65 "has to include a fair estimate of those [interest] credits." *Id.* Xerox was, in short, inviting participants "to sell their pension en-

titlement back to the company cheap, and that is a sale that ERISA prohibits." *Id.* at 762.

2. Value of accrued benefit in the AK Steel Plan

AK Steel argues that it is allowed under ERISA to use the same statutory rate at both steps of the whipsaw calculation because the Plan does not provide an accrued benefit "in the form of an annual benefit commencing at normal retirement age" as specified in Treas. Reg. § 1.411(a)-7(a)(1)(i). It argues that because West received a lump-sum distribution, his accrued benefit was provided in a different form and is therefore governed by subsection (ii) of that regulation. Under that subsection, the accrued benefit is "an annual benefit commencing at normal retirement age which is the actuarial equivalent" of the accrued benefit determined under the plan. Treas. Reg. § 1.411(a)-7(a)(1)(ii). If AK Steel can fit its definition of accrued benefit within that subsection, so the argument goes, then it can use the same actuarial equivalence factors under IRC § 411(c)(3) both to project forward the age-65 annuity and to discount the annuity to present value. The result would always equal the participant's account balance at the time of the lump-sum payout.

We respectfully disagree. The AK Steel Plan expressly states in § 1.2 that the

> "Accrued Benefit" is the "Accounts payable in the form of a single life annuity commencing on a Participant's Normal Retirement Date (or, if later, such Participant's actual retirement date) that is the Actuarial Equivalent of the Participant's current Account.

A benefit paid at any other time or in another form "must be worth at least as much as that annuity. *Esden*, 229 F.3d at 163. AK Steel equates the lump-sum payment option it offers to participants as an accrued benefit "to be determined as an amount other than an annual benefit commencing at normal retirement age," which under its theory would entitle it to make the whipsaw calculation a complete wash. *See* IRC § 411(c)(3).

The definition of what constitutes an accrued benefit under the terms of the Plan, however, is clear -- the annual benefit commencing at normal retirement age. AK Steel Plan § 1.2. To the extent that the Plan's language with respect to lump-sum distributions is ambiguous in that it conflicts with the definition of "accrued benefit" in another section of the Plan, the ambiguity must be resolved in the plaintiffs' favor. *See Regents of Univ. of Mich.* v. *Employees of Agency Rent-A-Car Hosp. Ass'n*, 122 F.3d 336, 340 (6th Cir. 1997) ("[A]ny ambiguities in the language of the [ERISA] plan [are to] be construed strictly against the drafter of the plan.").

We believe that the facts of the present case on this particular point are indistinguishable from *Esden* and *Berger*. Had West elected not to cash out of the AK Steel Plan by taking the lump-sum distribution prior to reaching the age of 65, he would have continued to receive interest credits on his Opening and Future Accounts under the Plan. Those interest credits were not taken into account by the Plan when disbursing a lump-sum payout "equal to his Accounts" before West reached the age of 65. AK Steel Plan § 4.1. The Plan's terms thus did not comply with the law. *See Esden*, 229 F.3d at 172. What hap-

pened here is exactly what happened in *Berger* -- West was required to "sell" his pension entitlement back to AK Steel at a discount in order to receive his lump-sum payout. *See Berger*, 338 F.3d at 762. AK Steel's requirement thus violates ERISA.

"Any distribution in optional form (such as a lump sum) must be no less than the actuarial equivalent of [the normal retirement] benefit." *Esden*, 229 F.3d at 159. And as discussed above, the normal retirement benefit is "a single-life annuity payable at normal retirement age." *Id.*; *see also* AK Steel Plan § 1.2. AK Steel's complicated interpretations of the relevant statutes and regulations do not, in our view, refute these basic legal principles.

But AK Steel argues that affirming the district court's requirement that the Plan base early lump-sum payouts on the whipsaw calculation will lead to unintended and catastrophic results. It also claims that affirming the district court's ruling somehow amounts to age discrimination. We find neither of these arguments to be persuasive. First of all, the whipsaw calculation may have an unintended effect on this particular Plan, but that is not the issue here. As the *Esden* court noted: "[i]t is undisputed that the governing statutes and regulations were developed with traditional final-pay defined benefit plans in mind; they do not always fit in a clear fashion with cash balance plans and they sometimes require outcomes that are in tension with the objectives of those plans." *Esden*, 229 F.3d at 159. The Plan is nonetheless required to comply with ERISA. As explained above, we conclude that it did not do so in this case. Second, what may appear at first blush to be age discrimination is really nothing

more than the time value of money. *See Cooper* v. *IBM Personal Pension Plan*, 457 F.3d 636, 639 (7th Cir. 2006) ("Treating the time value of money as a form of discrimination is not sensible.").

AK Steel attempts to undercut the persuasive force of *Esden* and *Berger* "because both decisions upheld whipsaw claims on the basis of deference to [Treasury] Notice 96-8." It argues that both the Second Circuit and the Seventh Circuit unknowingly deferred to a Notice that the IRS is "fundamentally reconsidering." This argument misconstrues, in our view, the nature of those holdings. AK Steel is correct in that both decisions discussed Notice 96-8 in some detail and cited it as support for their conclusions that the whipsaw calculation was required. *See Esden*, 229 F.3d at 169 (holding that the Notice is "entitled to deference, regardless of its form of publication"); *Berger*, 338 F.3d at 762 (describing Notice 96-8 as "authoritative").

But the court in *Esden* specifically stated that "even if we were to disregard Notice 96-8, we would reach the same result, as explained above, on the basis of the governing statutes and regulations." 229 F.3d at 172; *accord Berger*, 338 F.3d at 763 ("We conclude, in agreement with the Second Circuit which considered a materially identical plan in the Esden case, that the Xerox plan's method of computing the plaintiffs' lump-sum entitlements violates ERISA.").

In sum, we agree with the analysis of our sister circuits and with that of the district court below. Each plaintiff is entitled to have his or her lump-sum distribution reevaluated using the whipsaw calculation as determined by the district court, plus interest.

D. Preretirement mortality discount

AK Steel next argues that even if a whipsaw calculation is required under ERISA, the district court erred in holding that the Plan may not use a preretirement mortality discount in performing that calculation. The mortality discount, according to the district court, "factors into the present value of a future benefit the possibility that a participant might die before receiving that benefit, and thus receive nothing." Relying on *Berger* v. *Xerox*, 231 F. Supp. 2d 804 (N.D. Ill. 2002) (Berger I), and *Crosby* v. *Bowater Inc. Retirement Plan for Salaried Emples. of Great Northern Paper, Inc.*, 212 F.R.D. 350 (W.D. Mich. 2002), vacated and remanded on other grounds, *Crosby* v. *Bowater*, 382 F.3d 587 (6th Cir. 2004), the district court concluded that a preretirement mortality discount "should not be applied to the present value calculation because it would reduce a participant's 'accrued benefit' of the interest credit rate projection."

The issue, according to the district court, is whether ERISA's actuarial-equivalence rules forbid the use of a mortality discount. It reasoned that the central premise underlying the whipsaw calculation is "that a participant's benefit should not be reduced by electing to receive a lump sum instead of waiting to receive an annuity." Because the AK Steel Plan did not contemplate using the whipsaw calculation at all, the Plan does not address whether a mortality discount applies.

If a Plan participant dies before reaching the age of 65, the Plan's terms provide that the surviving spouse or other beneficiary receives a death benefit "equal to the participant's pension benefit." Section

5.1 of the AK Steel Plan defines the death benefit for an unmarried participant as the greater of (1) a lump sum equal to the participant's account at the time of death, or (2) the actuarial equivalent of the participant's minimum protected benefit as defined by § 4.8. The minimum protected benefit under § 4.8 is the actuarial equivalent of the participant's accrued benefit. And, as stated above, the accrued benefit is defined as the "Accounts payable in the form of a single life annuity commencing on a Participant's Normal Retirement Date . . . that is the Actuarial Equivalent of the Participant's current Account." AK Steel Plan § 1.2. Because the beneficiary receives a death benefit equal to the participant's accrued benefit, he or she "steps into [the participant's] shoes and is entitled to his entire pension benefit." *See Berger II*, 338 F.3d at 764 (rejecting the Plan's argument that a preretirement mortality discount properly applied to the calculation of damages in whipsaw claims materially indistinguishable from the present case).

AK Steel argues, however, that *Berger I* and *Crosby* were both incorrectly decided, so that any reliance by the district court on those cases is misplaced. We respectfully disagree, and find that the reasons given by the *Berger I* court (and relied upon by the district court) for rejecting the use of a preretirement mortality discount to be well-supported. Even if the participant were to die before the age of 65, his or her beneficiary is still entitled to the entire accrued benefit. AK Steel Plan § 1.2. "Use of a mortality discount for the period before age sixty-five would, accordingly, result in a partial forfeiture of benefits in violation of the ERISA vesting rules (*i.e.*,

the anti-forfeiture rules)." *Berger I*, 231 F. Supp. 2d at 804. Using a mortality discount to reduce the present value of the lump-sum distribution in the present case would also have the effect of reducing the value of the interest credits, as the district court pointed out. This would create the same impermissible forfeiture under ERISA as described in Part II.C. above.

E. Pension Protection Act of 2006

AK Steel's final challenge to the district court's decision relates to the PPA, which the President signed into law on August 17, 2006. This law resolves the whipsaw controversy for the future by amending ERISA and the IRC to explicitly state that cash balance plans are not required to employ the whipsaw calculation when figuring lump-sum distributions. Section 701(a)(2) amends ERISA § 203 by adding special rules for defined benefit plans. One such rule is that these plans "shall not be treated as failing to meet . . . the requirements of [ERISA § 203(a)(2)], or . . . the requirements of section 204(c) or section 205(g) . . . solely because the present value of the accrued benefit (or any portion thereof) of any participant is, under the terms of the plan, equal to the amount expressed as the balance in the hypothetical account." PPA § 701(a)(2). Section 701(b)(2) similarly amends the IRC.

The PPA specifies that these amendments "shall apply to periods beginning on or after June 29, 2005," PPA § 701(e)(1), and that they "shall apply to distributions made after the date of the enactment of this Act," which was August 17, 2006. PPA § 701(e)(2). AK Steel argues that any monetary relief paid to West and the other class plaintiffs would be a

"distribution" made after August 17, 2006, and therefore not required by the PPA.

We find this argument to be without merit. As West points out, the class is limited to vested participants in the AK Steel Plan "who retired or were terminated from employment on or after January 1, 1995 and who received their pension benefits under the Plan in the lump sum form of payment on or before April 1, 2005." Internal Revenue Service Notice 2007-6, which provides transitional guidance regarding the application of the PPA to cash balance plans, states that the amendments at issue here "are generally effective for periods beginning on or after June 29, 2005." Notice 2007-6, 2007-3 I.R.B. 272 (Jan. 16, 2007). Moreover, Section 701(d)(2) of the PPA provides that "[n]othing in the amendments made by this section shall be construed to create an inference with respect to . . . the determination of whether an applicable defined benefit plan fails to meet the requirements of sections 203(a)(2), 204(c), or 205(g) of [ERISA or the Code] solely because the present value of the accrued benefit (or any portion thereof) of any participant is, under the terms of the plan, equal to the amount expressed as the balance in a hypothetical account."

Questioning the correctness of the whipsaw calculation to the case before us based upon the enactment of the PPA would thus be improper. *Cf. O'Gilvie* v. *United States*, 519 U.S. 79, 90, 117 S. Ct. 452, 136 L. Ed. 2d 454 (1996) (holding that a section of the Small Business Job Protection Act of 1996 did not apply "[b]ecause it is of prospective application," and because "[t]he Conference Report on the new law says that 'no inference is intended' as to the proper

interpretation of § 104(a)(2) prior to amendment") (citation and brackets omitted). The legislative history of the PPA also supports this conclusion. *See* 152 Cong. Rec. at S8762 (daily ed. Aug. 3, 2006) (quoting Senator Max Baucus, the ranking member of the PPA's reporting committee, as saying "We have dealt with the law going forward. We intend no inference to what the rules were prior to enactment. We will leave the past to the courts.") (emphasis added).

What is at stake here is a damages claim for AK Steel's past miscalculation of benefits. The monetary relief awarded by the district court is not a new "distribution" under a retirement plan as contemplated by the PPA, but retrospective relief for a past violation of the law as it stood at the time of the distribution. *See, e.g.*, *Lieske* v. *Morlock*, 570 F. Supp. 1426, 1430 (N.D. Ill. 1983) (denying the plan administrator's motion to dismiss the beneficiaries' ERISA claim as moot where the complaint "[did] not seek distribution of lump sum payouts but rather damages incurred by the plaintiffs as a result of defendants wrongfully denying the lump sum distributions").

Characterizing the damages award in the present case as a distribution subject to the parameters of the PPA would make the PPA effectively retroactive despite specific language in the statute to the contrary. We decline to do so here. Because of our conclusion that the PPA is not retroactive in application, it has no effect on the legal analysis of the present case.

III. CONCLUSION

For all of the reasons set forth above, we AFFIRM the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN D. WEST, on behalf of himself
and all others similarly situated,

Plaintiff-Appellee,

v.

AK STEEL CORPORATION (formerly Armco Inc.)
RETIREMENT ACCUMULATION PENSION PLAN
and AK STEEL CORPORATION BENEFIT PLANS
ADMINISTRATIVE COMMITTEE,

Defendants-Appellants.

No. 06-3442

August 8, 2007, Filed

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in

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* Judge Daughtrey recused herself from participation in this ruling.

the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

JOHN D. WEST, on Behalf of Himself and All Other Persons Similarly Situated,
Plaintiff,

vs.

AK STEEL CORPORATION RETIREMENT ACCUMULATION PENSION PLAN, et al.,
Defendant.

Case 1:02-cv-0001

April 8, 2004, Decided

ORDER

This matter is before the Court on Plaintiffs' Motion for Partial Summary Judgment (Doc. No. 37) and Defendants' Motion for Summary Judgment (Doc. No. 39). Plaintiffs' filed a joint memorandum in opposition to Defendants' motion and a reply in support of their own motion (Doc. No. 42) to which Defendants filed a reply (Doc. No. 44). The parties filed a number of supplemental filings of recent authority relating to the issues raised in this case. (Doc. No. 45, 47, and 48).

I. BACKGROUND

This class action[1] was brought by former participants of the AK Steel Corporation Retirement Ac-

[1] The Court certified the class on March 9, 2004. (Doc. No. 55).

cumulation Pension Plan ("the AK Steel Plan")[2] against the AK Steel Plan and the AK Steel Corporation Benefit Plan Administrative Committee ("the AK Steel Committee") for violations of the Employee Retirement Income Act of 1974 ("ERISA") and the Internal Revenue Code ("I.R.C.") (Doc. No. 1, P 31).

The AK Steel Plan is a cash balance plan, a hybrid of a traditional defined benefits plan and a traditional defined contribution plan.[3] Under a cash balance plan, an employee has a hypothetical account balance which periodically increases by a specified percentage of the employee's salary ("a compensation credit") plus an interest credit. When an employee reaches the normal age of retirement (usually age 65), his or her pension benefit is the value of the hypothetical account balance in the form of a single life annuity and/or a lump sum disbursement.

The issue in this case is the manner in which a participant's benefit is calculated in the event his or her participation in the AK Steel Plan is terminated

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[2] The AK Steel Plan is a component of a larger plan, the AK Steel Corporation Noncontributory Pension Plan, which resulted from the merger of Armco with AK Steel Corporation and the merger of their respective pension plans in 1999.

[3] Under a traditional defined contribution plan, an employee's pension benefit is the value of his or her retirement account to which contributions have been made by the employer and/or employee. Under a defined benefit plan, an employee's pension benefit is an amount, either in the form of an annuity or lump sum, equal to a specified percentage of the employee's salary in the final years of his employment.

prior to reaching normal retirement age.[4] Under the AK Steel Plan, such a participant may elect to receive his or her pension benefit in the form of an immediate lump sum disbursement. The amount of the lump sum disbursement is equal to the amount of a participant's hypothetical account balance.

Plaintiffs have brought the current action alleging that the manner in which their lump sum disbursements were calculated under the AK Steel Plan violated ERISA and the I.R.C. Plaintiffs are seeking partial summary judgment on the issue of liability and Defendants are seeking summary judgment on all of Plaintiffs' claims.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party opposing a properly supported summary judgment motion "'may not rest upon the mere alle-

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[4] Armco converted its traditional defined benefit plan into a cash balance plan on January 1, 1995. Employees affected by the conversion received two types of hypothetical accounts - a Future Account and an Opening Account. The Future Account was for service after January 1, 1995 and was credited with both compensation and interest credits. The Opening Account included benefits earned prior to January 1, 1995. An employee's Opening Account balance was determined by converting an employee's pre-1995 life annuity benefit into an account balance by calculating the present value of the employee's life annuity using a 7.5% discount rate. After the initial conversion, only interest credits were added to the Opening Account.

gations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (quoting *First Nat'l Bank of Arizona* v. *Cities Serv. Co.*, 391 U.S. 253, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)). The Court is not duty bound to search the entire record in an effort to establish a lack of material facts. *Guarino* v. *Brookfield Township Trs.*, 980 F.2d 399, 404 (6th Cir. 1992); *InterRoyal Corp.* v. *Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989), cert. denied, *Superior Roll Forming Co.* v. *InterRoyal Corp.*, 494 U.S. 1091, 108 L. Ed. 2d 967, 110 S. Ct. 1839 (1990). Rather, the burden is on the non-moving party to "present affirmative evidence to defeat a properly supported motion for summary judgment ...," *Street* v. *J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989), and to designate specific facts in dispute. *Anderson*, 477 U.S. at 250. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industries Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). The court construes the evidence presented in the light most favorable to the non-movant and draws all justifiable inferences in the non-movant's favor. *United States* v. *Diebold Inc.*, 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962).

III. DISCUSSION

ERISA classifies retirement plans as either defined contribution plans or defined benefit plans. *See* ERISA §§ 3(34), (35), 29 U.S.C. §§ 1002 (34),(35). If a plan does not meet the definition of a defined

contribution plan, it is considered a defined benefit plan by default. ERISA § 3(35). Cash balance plans fall into this category. As such, the terms and administration of a cash balance plan must comply with the same ERISA requirements as those for a traditional defined benefit plan.

The issue before the Court is whether the lump sum disbursements received by Plaintiffs complied with ERISA's requirements relating to the early payment of pension benefits.[5] Generally, a pension benefit under a traditional defined benefit plan is in the form of an annual benefit beginning when a participant reaches retirement age. Consequently, ERISA defines a participant's accrued benefit under a defined benefit plan as an "individual's accrued benefit determined under the plan ... expressed in the form of an annual benefit commencing at normal retirement age." ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A).

While ERISA defines an accrued benefit in the form of an annual benefit, it does not actually mandate that pension benefits be paid in such a form. Thus, plans are permitted to disburse benefits in other forms, such as a lump sum disbursement. To protect a participant who receives his or her benefit in the form of a non-annuity, ERISA requires that when a pension benefit takes some other form than an annual benefit, the alternative form must "be the actuarial equivalent" of an annuity commencing at

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[5] Plaintiffs have brought identical claims under both ERISA and the I.R.C. For the sake of simplicity the Court will analyze Plaintiffs' claims under ERISA.

normal retirement age. *See* ERISA § 204(c)(3), 29 U.S.C. 1054(c)(3). *See also*, *Berger* v. *Xerox*, 338 F.3d 755, 759 (7th Cir. 2003) ("ERISA requires that any lump sum substitute for an accrued pension benefit be the actuarial equivalent of that benefit."); *Esden* v. *Bank of Boston*, 229 F.3d 154, 163 (2nd Cir. 2000), cert. dismissed, 531 U.S. 1061, 148 L. Ed. 2d 652, 121 S. Ct. 674 (2001). Consequently, a lump sum disbursement, like the ones received by Plaintiffs under the AK Steel Plan, must be the actuarial equivalent of the annual benefit the participants would have received at normal retirement age.[6]

In the case of a cash balance plan, the actuarial equivalent is calculated by projecting a participant's hypothetical account balance to normal retirement age using the rate at which future interest credits would have been calculated if the participant had remained in the plan until retirement age and then discounting it back to its present value. *See Xerox*, 338 F.3d at 760; *Esden*, 229 F.3d at 159. If the rate at which a participant's hypothetical account balance is projected forward is the same as the rate at which it is discounted back, the amount of the participant's lump sum disbursement will be equal to the amount of his or her hypothetical account balance. However, if the projection rate is higher than the discount rate, the amount of the participant's lump sum disbursement will be larger than his or her hypothetical account balance. Such a situation exists if a cash balance plan's rate for calculating future interest credits is higher than the discount rate

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[6] Normal retirement age under the AK Steel Plan is 65.

established by ERISA. This is commonly referred to as a "whipsaw" calculation. *See Esden*, 229 F.3d at 159, fn. 7.

Administrators of cash balance plans are naturally reluctant to engage in whipsaw calculations because participants whose participation in a plan is terminated prior to normal retirement age would receive lump sum disbursements larger than their hypothetical account balances. Despite the existence of regulations upholding whipsaw calculations, sponsors of cash balance plans have argued that whipsaw calculations are not required under ERISA. *See* T.R. § 1.411(a)-11(d), 26 C.F.R. § 1.411(a)-11(d)-11(d); I.R.S. Notice 96-8. Several courts have addressed this issue and have consistently held that ERISA's valuation rules are valid and that cash balance must comply with these valuation rules even if such compliance results in a whipsaw effect. *See Xerox*, 338 F.3d at 763; *Esden*, 229 F.3d at 165-68.[7]

Based on these authorities, Plaintiffs argue that the administrators of the AK Steel Plan were required to engage in a whipsaw calculation when

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[7] In *Esden*, the court explained the purpose of ERISA's valuation rules:

> For the purposes of [actuarial equivalence], the regulations do not leave a plan free to choose its own methodology for determining the actuarial equivalent of the accrued benefit expressed as an annuity payable at normal retirement age. If plans were free to determine their own assumptions and methodology, they could effectively eviscerate the protections provided by ERISA's requirement of "actuarial equivalence."

Esden, 229 F.3d at 164.

calculating their early lump sum disbursements. Under the current administration of the AK Steel Plan, lump sum disbursements paid prior to normal retirement age are equal to the amount of a participant's hypothetical account balance at the time he or she stopped participating in the plan. Plaintiffs' contend that this practice violates ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3), because such lump sum disbursements are not the actuarial equivalent of the annual benefit to which Plaintiffs would have been entitled if they had remained in the AK Steel Plan until age 65.

Defendants disagree, arguing that the facts of the present case distinguish it from the case law upholding whipsaw calculations. Specifically, Defendants argue that, under the AK Steel Plan, the projection rate is a statutory rate established by ERISA rather than the rate established by the AK Steel Plan. Furthermore, Defendants argue that, due to changes in the law, the discount rate that should be used in the calculation of an AK Steel Plan participant's lump sum disbursement is not established by ERISA, as was the case in the *Xerox* and *Esden* cases. If Defendants' prevail on both of these arguments, the projection and discount rates would be the same. Therefore, the rates would cancel each other out and the amount of Plaintiffs' lump sum disbursements would be the same as their hypothetical account balances.

a. Projection Rate

Defendants argue that to the extent that any projection forward is required, the projection rate is established by ERISA rather than the terms of the AK Steel Plan.[8] Specifically, Defendants contend that the projection rate of a participant's hypothetical account balance is controlled by ERISA § 204 (c)(3), 29 U.S.C. § 1054(c)(3).[9] According to Defendants, the purpose of § 204 (c)(3) is to convert a "plan accrued benefit" that is in the form of a non-annuity, such as a hypothetical account balance, into an annual benefit commencing at normal retirement age. Defendants' characterize the product of this conversion as a participant's "statutory accrued benefit".[10] Because the administrators of the AK Steel Plan view a participant's "plan accrued benefit" as the

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[8] Defendants contend that the Xerox and Esden courts were never presented with this particular argument and therefore, did not consider it when reaching their respective holdings.

[9] ERISA § 204(c)(3) provides as follows:

> For the purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, or if the accrued benefit derived from contributions made by an employee is to be determined with respect to a benefit other than an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the employee's accrued benefit, or the accrued benefits derived from contributions made by an employee, as the case may be, shall be the actuarial equivalent of such benefit or amount determined under paragraph (1) or (2).

[10] The terms "plan accrued benefit" and "statutory accrued benefit" do not appear anywhere in ERISA's statutory scheme.

participant's hypothetical account balance, Defendant's argue that § 204(c)(3) controls the projection of a participant's hypothetical account balance to normal retirement age.

The Court need not reach the merits of Defendant's interpretation of § 204(c)(3) because Defendant's argument fails on a more fundamental basis. The premise underlying Defendants' entire argument is that a participant's accrued benefit under the AK Steel Plan is the participant's hypothetical account balance. However, § 1.2 of the AK Steel Plan plainly states that the term "accrued benefit" means "[a participant's hypothetical account] payable in the form of a single life annuity commencing on a Participant's Normal Retirement Date . . . that is the Actuarial Equivalent of the Participant's current Account."[11] (Doc. 39, Exh. 2, § 1.2) (emphasis added). Thus, contrary to Defendants' premise, a participant's accrued benefit under the AK Steel Plan is an annuity rather than his or her hypothetical account balance. Consequently, it does not appear that the

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[11] Section 1.2 provides in full:

> "Accrued Benefit" means that Accounts payable in the form of a single life annuity commencing on a Participant's Normal Retirement Date (or, if later, such Participant's actual retirement date) that is the Actuarial Equivalent of the Participant's current Account. The Account is projected to Normal Retirement Date and converted to a single life annuity using the factors set forth in Exhibit I. This single life annuity shall be determined by dividing the then current value of such Participant's Account by the applicable factor as described in Section A of Exhibit I.

(Doc. No. 39, Exh. 2, § 1.2)

provisions § 204(c)(3) are even triggered with respect to the projection forward of a participant's hypothetical account balance.

Despite the plain language of § 1.2, Defendants contend that a participant's accrued benefit under the AK Steel Plan is, in fact, his or her hypothetical account balance rather than the single life annuity referenced in § 1.2. Defendants argue that § 1.2 is merely the incorporation of the provisions of § 204(c)(3) into the AK Steel Plan. Thus, according to Defendants, § 1.2 defines a participant's "statutory accrued benefit" not a participant's "plan accrued benefit".

Defendants' argument, although creative, ignores a fundamental principle of ERISA law - the plain language of the plan controls. *E.g.*, *Marquette General Hospital* v. *Goodman Forest Industries*, 315 F.3d 629, 633 (6th Cir. 2003) ("ERISA plans should be interpreted 'according to their plain meaning, in an ordinary and popular sense.'" (quoting *Perez* v. *Aetna Life Ins. Co.*, 150 F.3d 550, 556 (6th Cir. 1998)) The AK Steel Plan does not distinguish between a "plan accrued benefit" and a "statutory accrued benefit". Under the plain language of the Plan, the term "accrued benefit" is defined as a single life annuity commencing at normal retirement age. Accordingly, a participant's accrued benefit under the AK Steel Plan is in the form of an annual benefit commencing at normal retirement age. If the Plan drafters had intended otherwise, (*i.e.*, that § 1.2 merely be a restatement of § 204(c)(3)), they could have indicated that intent in the language of the Plan. They did not do so. Therefore, because a participant's accrued benefit is defined by the AK Steel Plan in the form of

an annual benefit commencing at age 65, the provisions of § 204 (c)(3) are not implicated in the projection of a participant's hypothetical account balance.

Under I.R.S. Notice 96-8, *Xerox*, and *Esden*, the projection rate is the rate at which future interest credits are calculated. I.R.S. Notice 96-8 (III) (B) (1), *Xerox*, 338 F.3d at 760; *Esden*, 229 F.3d at 165-68. Neither of the parties have provided the Court with a clear understanding of the rate at which the AK Steel Plan calculates future interest credits. It appears that the parties anticipate that the rate will be determined during the damages phase of this litigation in the event the Court finds in favor of Plaintiffs on liability.[12]

b. Discount Rate

In addition to disagreeing on the projection rate, the parties also disagree on the appropriate dis-

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[12] During briefing of their respective motions, both parties have argued that the appropriate projection rates can be found in Exhibit I of the AK Steel Plan. Plaintiffs' argue that the appropriate rate can be found in Exhibit I (A) while Defendants' argue that it can be found in Exhibit I(C). The Court is not convinced that either of the parties are correct on this point. The interest credit rate for Future and Opening Accounts is established in § 3.3 of the AK Steel Plan. The Court believes it is this rate that should be used when projecting Plaintiffs' hypothetical account balances to normal retirement age.

When determining the projection rate under § 3.3, consideration must be given to minimum/maximum rates established by § 3.3 and to the appropriate methods for performing actuarial equivalency calculations using a variable interest rate. *See Esden*, 229 F.3d at 176 (projection rate could not fall below the 5.5 % floor established in the plan); *Xerox*, 338 F.3d at 760 (T.R. § 1.401(a)(4)-8(c)(3)(v)(B) provides the methods for performing calculations using a variable interest rate).

count rate that should be used when calculating the present value of a participant's accrued benefit. Plaintiffs argue that the present value calculation should be performed using the rates established by ERISA § 205(g)(3), 29 U.S.C. 1055(g)(3).[13] *See* ERISA § 203(e)(2), 29 U.S.C. § 1053(e)(2). In support of their argument, Plaintiffs rely on T.R. § 1.411(a)-11(d), 26 C.F.R. § 1.411(a)-11(d),[14] and I.R.S. Notice 96-8, both of which require that the present value calculation for consensual lump sum disbursements be performed using the discount rates established in ERISA § 205(g)[15]. The requirements of T.R. § 1.411(a)-11(d) and I.R.S. Notice 96-8 have been upheld by a number of courts. *Xerox*, 338 F.3d at 762 ("I.R.S. Notice 96-8 is "an authoritative interpretation of the applicable [ERISA] statutes and regulations . . . ") (citing *Esden*, 229 F.3d at 168-69)); *Esden*, 229 F.3d at 168-71, 173-74; *Lyons* v. *Georgia-Pacific Corporation*, 221 F.3d 1235, 1249 (11th Cir. 2000) ("*Lyons II*"), cert. denied, 532 U.S. 967, 149 L. Ed. 2d 388, 121 S. Ct. 1504 (2001).

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[13] ERISA and the I.R.C. have a number of parallel provisions with nearly identical wording. *Lyons*, 221 F.3d at 1243. ERISA § 205(g) is the counterpart to I.R.C. § 417 (e) and ERISA § 203(e) is the counterpart to I.R.C. 411(a)(11). To avoid confusion, the Court will only refer to the ERISA code sections.

[14] T.R. § 1.411(a)-11(d) was promulgated under I.R.C. § 411(a)(11). ERISA § 3002(c), 29 U.S.C. § 1202 (c), makes T.R. § 1.411(a)-11(d) applicable to ERISA § 203 (e).

[15] T.R. § 1.411(a)-11(d) and I.R.S. Notice 96-8 refer to I.R.C. § 411(e). However, as explained in footnote 14, such regulations are also applicable to ERISA § 203(e).

Defendants argue that the § 205(g)(3) rates are not applicable in this case because T.R. § 1.411(a)-11(d) was invalidated when ERISA § 203(e), the ERISA statute underlying T.R. § 1.411(a)-11(d), was amended in 1994. To fully understand Defendants argument, a review of the history of § 203(e) is required.

ERISA § 203(e) was enacted in 1984, prior to the advent of cash balance accounts. As originally enacted, § 203(e), which was titled "Restrictions on mandatory distributions", required that a participant's consent be obtained before a participant's accrued benefit could be distributed as a lump sum if the present value of the participant's accrued benefit exceeded $ 3500.[16] The second paragraph of the statute established the rate at which the present value calculation should be performed. ERISA § 203(e)(2). It is Defendant's position that the sole application of

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[16] The 1984 version of § 203(e) provides:

> (e) Restrictions on mandatory distributions
>
> (1) If the present value of any accrued benefit exceeds $ 3,500, such benefit shall not be treated as nonforfeitable if the plan provides that the present value of such benefit could be immediately distributed without the consent of the participant.
>
> (2) For purposes of paragraph (1), the present value shall be calculated by using an interest rate not greater than the interest rate which would be used (as of the date of the distribution) by the Pension Benefit Guaranty Corporation for purposes of determining the present value of a lump sum distribution on plan termination.

Pub. L. No. 98-397 § 105(1984); 29 U.S.C. § 1053(e) (1985).

§ 203(e)(2) was to calculate the present value of a participant's accrued benefit for the purpose of determining whether the present value of the benefit exceeded $ 3500. Defendant's interpretation of § 203(e)(2) is based on the legislative history[17] of the statute and on the fact that § 203(e)(2) opened with the phrase "for the purposes of paragraph (1)", indicating that the present value calculation of paragraph 2 was only performed to determine the need for consent described in paragraph 1. The signifi-

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[17] In support of their position, Defendants point to the Senate Report accompanying the 1984 Act, which states as follows:

> Under present law, in the case of an employee whose plan participation terminates, a pension, profit-sharing, or stock bonus plan (pension plan) may involuntarily "cash out" the benefit (i.e., pay out the balance to the credit of a plan participant without the participant's consent) if the present value of the benefit does not exceed $ 1,750 ...
>
> ...
>
> Explanation of Provisions
>
> The bill provides that, if the present value of an accrued benefit exceeds $ 3,500, then the benefit is not to be considered non-forfeitable if the plan provides that the present value of the benefit can be immediately distributed without the consent of the participant ... Under the bill, the interest rate to be used in determining whether the present value of a benefit exceeds $ 3,500 is not to be greater than the interest rate that would be used (as of the date of distribution) by the Pension Benefit Guaranty Corporation (PBGC) for the purposes of determining the present value of a lump sum distribution upon termination of the plan.

S. Rep. No. 98-575 (1984), reprinted in 1984 U.S.C.C.A.N. 2547, 2569 (emphasis added).

cance of Defendants' argument will become apparent as the Court proceeds with its analysis.

In 1986, § 203(e) was amended. The discount rate established in § 203(e)(2) was replaced with discount rates that varied depending on whether a participant's accrued benefit was at or above or below $ 25,000.[18] Additionally, the heading of § 203(e) was changed from "Restrictions on mandatory distribu-

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[18] The 1986 version of § 203(e) provides:

> (e) Consent for distribution; present value; covered distributions
>
> (1) If the present value of any nonforfeitable benefit
>
> with respect to a participant in a plan exceeds $ 3,500, the plan shall provide that such benefit may not be immediately distributed without the consent of the participant.
>
> (2)(A) For purposes of paragraph (1), the present value shall be calculated -
>
> (i) by using an interest rate not greater than the applicable interest rate if the vested accrued benefit (using such rate) is not in excess of $ 25,000, and
>
> (ii) by using an interest rate no greater than 120 percent of the applicable interest rate if the vested accrued benefit exceeds $ 25,000 (as determined under clause (I)).
>
> In no event shall the present value determined under subclause (ii) be less than $ 25,0000.
>
> (B) For purposes of subparagraph (A), the term "applicable interest rate" means the interest rate which would be used (as of the date of the distribution) by the Pension Benefit Guaranty Corporation for purposes of determining the present value of a lump sum distribution on plan termination.

29 U.S.C. § 1053(e)(1990).

tions" to "Consent for distribution; present value; covered distributions."[19] 19 Shortly thereafter, T.R. § 1.411(a) -11(d) was promulgated requiring consensual lump sum disbursements to be discounted using the rates established in § 205(g).[20]

In *Esden* and *Lyons II*, T.R. § 1.411(a)-11(d) was challenged on the grounds that it exceeded the scope of the statute under which it was promulgated and was, therefore, invalid under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).[21] *Esden*, 229 F.3d at 173; *Lyons II*, 221 F.3d at 1244. Specifically, it was argued that § 203(e) only applied to non-consensual lump sum disbursements, not consensual lump sum disbursements.[22] *Esden*, 229 F.3d at 173; *Lyons II*, 221 F.3d at 1245. The *Esden* and *Lyons II* courts disagreed. *Esden*, 229 F.3d at 174; *Lyons II*, 221 F.3d at 1245. The courts noted that the statute accounted for accrued benefits up to and in excess of $ 25,000 when calculating the present value of a participant's accrued benefit. *Id.* The courts rea-

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[19] The heading change occurred later in 1986 and was made by the Office of the Law Revision Counsel. Lyons II, 221 F.3d at 1246, fn. 19.

[20] T.R. § 1.411 (a)-11(d) refers to I.R.C. § 417(e). The ERISA counterpart to § 417(e) is § 205(g).

[21] Under *Chevron*, a regulation is only valid if (1) Congress has not directly addressed the issue in question and (2) the agency's interpretation is based on a permissible construction of the statute. 467 U.S. at 843-43.

[22] A lump sum disbursement that was $ 3,500 or less was non-consensual because under § 203(e), a participant's consent was not required for disbursement of the benefit.

soned that if the statute was intended to apply only to non-consensual lump sum disbursements, Congress would not have included provisions to cover benefit amounts in excess of the non-consensual limit of $ 3,5000. *Id.* Based on the inclusion of such provisions, the *Esden* and *Lyons II* courts concluded that the statute applied to consensual as well as non-consensual lump sum disbursements.[23] *Esden*, 229 F.3d at 175; *Lyons II*, 221 F.3d at 1246. Consequently, the *Esden* and *Lyons II* courts held that T.R. § 1.411(a)-11(d) was valid under a Chevron analysis because it was a permissible construction of § 203(e). *Esden*, 229 F.3d at 175; *Lyons II*, 221 F.3d at 1249.

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[23] The legislative history seems to support this conclusion. The House Conference Report accompanying the 1986 amendments stated as follows:

> If the present value of the vested accrued benefit is no more that $ 25,000, then the amount to be distributed to the participant or beneficiary is calculated using the PBGC rate. If the present value of the accrued benefit exceeds $ 25,000 (using the PBGC interest rate), then the conference agreement provides that the amount to be distributed is determined using an interest rate no greater than 120 percent of the interest rate ... that would be used by the PBGC (as of the date of distribution) upon the plan's termination . . . For example, assume that, upon separation from service, the present value of an employee's total accrued benefit . . . is $ 50,000 using the applicable PBGC rate. Under the conference agreement, the plan may distribute to his employee ... the total accrued benefit, calculated using 120 percent of the applicable PBGC rate (*e.g.*, $ 47,000).

H.R. Conf. Rep. 99-841, pt. 3(1986), reprinted in 1986 U.S.C.C.A.N. 4075.

In 1994, § 203(e) was amended again by the Retirement Protection Act of 1994.[24] The amended statute eliminated the differing rates in paragraph 2 and replaced them with the rates established in § 205(g)(3), 29 U.C.C. § 1055 (g) (3). Two years later in 1996, I.R.S. Notice 96-8 was published requiring that the present value calculation for consensual lump sum disbursements be performed using the rates established in § 205(g)(3).

Defendants argue that T.R. § 1.411(a)-11(d) was invalidated by the 1994 amendment of § 203(e) because it could no longer be read as applying to consensual lump sum disbursements after the reference to accrued benefits up to and in excess of $ 25,000 was removed. Simply put, Defendants' argue that when § 203(e) was amended in 1994, it reverted back to its pre-1986 form. As discussed previously, it is Defendants' position that the pre-1986 § 203(e) only applied to non-consensual lump sum disbursements. Accordingly, Defendants argue that T.R. § 1.411(a)-11(d) is not a "permissible contruction[s]" of § 203(e),

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[24] The 1994 version of § 203(e) provides:

> (e) Consent for distribution; present value; covered distributions
>
> (1) If the present value of any nonforfeitable benefit with respect to a participant in a plan exceeds
>
> $ 5,000, the plan shall provide that such benefit may not be immediately distributed without the consent of the participant.
>
> (2) For purposes of paragraph (1), the present value shall be calculated in accordance with section 1055(g)(3) of this title.

because the 1994 version of the statute does not apply to consensual lump sum disbursements. In support of their argument, Defendants rely on *Lyons* v. *Georgia-Pacific Corp. Salaried Employees Retirement Plan*, 196 F. Supp. 2d 1260, 1271-72 (N.D. GA 2002) ("*Lyons III*"), in which the court held that T.R. §§ 1.411(a)-11(d) does not apply to consensual lump sum disbursements made after the 1994 amendment to § 203(e).[25]

The Court finds neither Defendants' argument nor the reasoning of *Lyons III* persuasive on this point. Defendants' argument that the 1994 version of § 203(e) only applies to non-consensual lump sum disbursement is based on his contention that the pre-1986 version of § 203(e) only applied to non-consensual lump sum disbursement. As previously discussed, Defendant's position regarding the scope of the pre-1986 version of § 203(e) is based on (1) the "limiting" phrase at the beginning of § 203(e)(2) and (2) the legislative history.

Whatever the purpose of the phrase at the beginning § 203(e)(2), it does not appear that its pur-

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[25] In *Lyons I*, 66 F. Supp. 2d 1328 (N.D. GA 1999), the court determined that T.R. § 1.411(a)-11(d) was invalid under a Chevron analysis. This decision was reversed by the *Lyons II* court, which concluded that the regulations were valid under the 1986 version of § 203(e). *Lyons II*, 221 F.3d at 1244-45. With respect to consensual lump sum disbursements made after the 1994 amendment to § 203(e), the *Lyons II* court stated that 1994 amendment "may or may not compel a different conclusion as to lump sum distributions made after the effective date of the 1994 legislation." In *Lyons III*, the court seized on this statement by that appellate court to revive its *Chevron* analysis with respect to post-1994 consensual lump sum disbursements.

pose was to limit the application of § 203(e) to non-consensual lump sum disbursements. The version of the statute analyzed by the *Esden* and *Lyons II* courts included the identical phrase, but neither of these courts found that the phrase limited the present value calculation to the determination of consent as required in § 203(e)(1).

Moreover, it seems clear from the legislative history of the 1986 and the 1994 amendment that Congress did not intend the phrase to be so limiting. The legislative history accompanying the 1986 amendment indicated a clear intention that § 203(e) should apply to consensual disbursements.[26] When the statute was amended in 1994, the legislative history did not indicate that Congress was amending the statute to limit is applicability to non-consensual disbursements only. On the contrary, the legislative history indicates that Congress contemplated that the statute would apply to any lump sum disbursement and was only amended for the purpose of remedying the manner in which the PBGC rate was used by the statute.[27] Thus, even if the legislative

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[26] *Supra*, at fn. 23.

[27] The House Report accompanying the 1994 amendment provided the following explanation for the change:

> The plan must [currently] value a single-sum payment using an interest rate no greater than the applicable PBGC interest rate. (If the value exceeds $ 25,000, the interest rates must be no greater than 120% of the applicable PBGC rate.) PBGC regulations have been revised to change the methodology for calculating the applicable PBGC interest rate for terminated plans. The change in the regulations does not apply for purposes of

(...continued)

history accompanying the original enactment of § 203(e) can be interpreted as limiting the scope of § 203(e) to non-consensual lump sum disbursements, the legislative history accompanying subsequent amendments indicates no such intent to limit the scope of § 203(e).[28] In fact, subsequent legislative history seems to indicate that Congress intended the

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> determining the applicable interest rate for valuing single-sum payments. A plan may use any reasonable mortality table it specifies.
>
> Congress adopted the interest rate cap to prevent plans from using unreasonably high interest rates to determine the present value of participants' benefits. If plans could use high interest rates, plans could lower the single sum paid to participants. The PBGC interest rates were adopted as the standard because the rates were presumed to duplicate group annuity rates. However, the PBGC interest rates reflect annuity rates only if considered in combination with specified PBGC mortality tables, and the law does not require that the specified PBGC mortality tables be used.
>
> Sections 405(a)and 405(c) of the bill amend sections 203(e)and 205(g) of ERISA and section 411(a)(11)and 417(e) of the Code to change the manner in which single sum distributions must be valued for purposes of these sections. Under the bill, single sum distributions may not be less than the amount that would be derived using the 30-year Treasury bond rate as of the date of distribution and a mortality table prescribed by the Secretary of the Treasury . . .

H. Rep. No. 103-632, pt. 2, Section 405 (1994)(emphasis added).

[28] It is not altogether clear from the legislative history that § 203(e), as originally enacted, was intended only to apply to non-consensual lump sum disbursements. In *Lyons II*, the Court noted that the legislative history accompanying the 1984 enactment "spoke in broader terms" than just mandatory distributions. *Lyons II*, 221 F.3d at 1242, fn. 10.

statute to apply to all lump sum disbursements, consensual or non-consensual.

Moreover, although certainly not determinative, it is noteworthy that when § 203(e) was amended in 1994, the heading of the statute remained "Consent for distribution; present value; covered distributions" and was not changed back to "Restrictions on mandatory distributions", further indicating a lack of intent to limit the application § 203(e) to non-consensual lump sum disbursements.

Finally, both the *Esden* and *Xerox* courts indicated that the 1994 amendment of § 203(e) had no effect on their holdings that T.R. §§ 1.411(a)-11(d) did not exceed the scope of § 203(e).[29]

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[29] When discussing the legislative history of § 203(e), the *Esden* court noted the continuing intent of Congress to regulate the discount rate that plans could use to calculate lump sum disbursements:

> The legislative history accompanying the Tax Reform Act of 1986, which introduced these consent and valuation restrictions, evidences a congressional intent to apply these valuation rules to all distributions. *See* H.R. Conv. Rep. No 99-841, pt. 2, at 488 (1986), reprinted in 1986 U.S.C.C.A.N. at 4075, 4576, reprinted in 1986-3 C.B. Vol. 4 at 488 (using an illustrative example of an employee with a $ 50,000 accrued benefit). And, in 1994, when Congress amended these provisions to replace the PBGC rate with the 30-year long-bond rate, it explained again its intention:
>
> > Congress adopted the interest rate cap to prevent plans from using unreasonably high interest rates to determine the present value of participants' benefits. If plans could use high interest rates, plans could lower the single sum paid to participants.

(...continued)

For all of these reasons, the Court concludes that the 1994 version of § 203(e) is ambiguous as to whether it applies to consensual as well as non-consensual lump sum distributions. In such a situation, regulations are permissible provided they are reasonable. *See e.g., Lyons III*, 221 F.3d at 1248. Numerous courts have found these regulations to be reasonable and Defendants' have not presented any

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H.R. Rep. No. 103-632, pt. 2, at 54 (1994) (emphasis added) reprinted in 1994.

> If there were no regulation of the discount rates that plans could use in calculating lump sum equivalents of accrued normal retirement benefits, they could eviscerate the protective provisions of ERISA

Esden, 229 F.3d at 175 (emphasis added).

Similarly, when discussing the appropriate discount rate, the *Xerox* court explained that new pension plans (*i.e.*, post-1994 plans) would use the 30-year T-bill rate. 338 F.3d at 760. The Court specifically cited to the 1994 version § 203(e)(2) in support of this proposition, indicating that the Court viewed the 1994 version of the statute as applying to consensual lump sum disbursements. *Id.*

The *Lyons II* court, however, alluded to the possibility that T.R. §§ 1.411(a)-11(d) would not be valid under the 1994 version of § 203(e):

> In the Retirement Protection Act of 1994, Congress removed the language relating to the calculation of present value amounts in excess of $ 25,000, thereby lessening (or perhaps removing) the ambiguity or self-contradictory nature of the § 203(e) provisions. That amendment may or may not compel a different conclusion as to lump sum distributions made after the effective date of the 1994 legislation.

221 F.3d at 1246.

arguments that would change this conclusion.[30] 30 *Xerox*, 338 F.3d at 760; *Esden*, 229 F.3d at 174, Lyons III, 221 F.2d at 1249. Therefore, HN11 the Court finds that T.R. §§ 1.411(a)-11(d) is valid with respect to lump-sum disbursement made after the amendment of § 203(e) in 1994.

Thus, under ERISA, the present value calculation for consensual lump sum disbursements should be performed using the discount rates established in ERISA § 205(g)(3), 29 U.S.C. § 1055 (g) (3), as required by T.R. §§ 1.411(a)-11(d) and I.R.S. Notice 96-8.

IV. CONCLUSION

Therefore, the Court concludes that the manner in which Plaintiffs' lump sum disbursements were calculated under the AK Steel Plan violated ERISA and the I.R.C. Consequently, Plaintiffs' Motion for Partial Summary Judgment (Doc. No. 37) with respect to liability is hereby GRANTED. Defendants' Motion for Summary Judgment (Doc. No. 39) is DENIED. This matter will proceed on the issue of damages.

IT IS SO ORDERED

Date: April 8, 2004
/s
Sandra S. Beckwith
United States District Judge

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[30] A number of Defendants' other arguments are based on policy considerations. Such considerations are within the purview of the legislature, and the Court will not ignore the statutory and administrative scheme of ERISA based on such considerations.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN D. WEST, on Behalf of
Himself and All Other Persons
Similarly Situated

Plaintiff,

vs.

AK STEEL CORPORATION
RETIREMENT ACCUMULATION
PENSION PLAN, et al.

Defendant.

Case 1:02-cv-0001

ORDER

This matter is before the Court on Defendant's Motion to Dismiss Plaintiffs' Claims (Doc. No. 58). Plaintiffs filed an opposition (Doc. 67), to which Defendant replied (Doc. 71). Defendant's motion contends that a recent decision from the Sixth Circuit, *Crosby* v. *Bowater*, 382 F.3d 587 (6th Cir. 2004), requires this Court to dismiss Plaintiffs' Complaint under Fed. R. Civ. P. 12(b)(1).

Background

This action was brought by John West, for himself and a class of former participants of AK Steel

Corporation's pension ("Plan"), against the Plan and its administrative committee. Plaintiff alleges that the Plan violated provisions of the Employee Retirement Income Act of 1974 ("ERISA") and the Internal Revenue Code ("IRC"). After granting class certification (Doc. 55), this Court granted partial summary judgment to the Plaintiffs (Doc. 56), holding that the manner in which the Plan calculated Plaintiff's lump sum retirement benefit violated ERISA. Briefly summarized, this Court found that Section 1.2 of the Plan clearly defines "accrued benefit" as a participant's hypothetical account, in the form of a single life annuity, that is the "actuarial equivalent" of the participant's current account. The Court rejected Defendant's argument that the projection rate for deriving that "actuarial equivalent" is found in ERISA (29 U.S.C. §1054(c)(3)), rather than within the Plan itself. This Court also found that the 1994 amendment to ERISA Section 203(e), 29 U.S.C. §1053(e), ambiguous with respect to its coverage of consensual lump distributions. Therefore, the Court found that Treasury Regulation §1.411(a)-11(d) was valid with respect to post-1994 distributions, and that the present value discount rates set forth in 29 U.S.C. §1055(g)(3) should have been used by the Plan.

The Sixth Circuit issued its decision in *Crosby v. Bowater Inc. Retirement Plan*, 382 F.3d 587 (6th Cir. 2004), on September 9, 2004. There, Crosby's employer, Bowater, sold the plant where Crosby worked, entitling Crosby to a lump sum payment of his accrued retirement benefit. He initially questioned the amount of the payment, which equaled his account balance (per a section of the plan), and asked the administrator to re-calculate using a "whipsaw"

formula. The administrator agreed to do so, resulting in a higher payment to Crosby. The district court's decision noted that Bowater's plan was silent as to the whipsaw formula used, and granted the administrator discretion to make such plan interpretations. See *Crosby* v. *Bowater*, 212 F.R.D. 350, 354 (W.D. Mich. 2002). Despite the higher payment, Crosby was unhappy with the administrator's use of a pre-retirement mortality discount as a part of that whipsaw calculation. After exhausting his administrative remedies, he filed suit.

Crosby's suit in the district court sought relief exclusively under Section 502(a)(3), 29 U.S.C. §1132(a) (3), which permits suits to enjoin practices which violate ERISA or plan terms, and for appropriate equitable relief. Crosby sought a judgment ordering the defendant to recompute the lump sum benefits, to pay additional benefits to him and to all employees who had already received lump sum payments, and to enjoin the defendant from utilizing the mortality discount in the future. Defendant moved to dismiss, arguing that Section 502(a) (3) does not authorize suits for payments of benefits, which the defendant claimed was precisely what Crosby was seeking. The district court, however, granted Crosby summary judgment on the merits, finding that Crosby's request for relief was sufficiently "equitable" to permit his claim under Section 502(a)(3).

The Sixth Circuit reversed. It held that "Section 502(a)(3) does not authorize a plan participant to sue for recovery of benefits due to him under the terms of the plan. That is the office of §502(1) (B) - a section with which Mr. Crosby has always insisted he will have nothing to do." *Crosby*, 382 F.3d at 594.

In so holding, the Sixth Circuit followed *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204 (2002). Under Knudson, courts considering Section 502(a)(3) claims "must determine whether the relief sought is truly equitable." *Knudson*, 534 U.S. at 209-10 (as quoted in *Oualchoice, Inc.* v. *Rowland*, 367 F.3d 638, 643 (6th Cir. 2004)). Because Crosby was clearly seeking a judgment ordering the defendant to pay him additional benefits (the amount of which had already been calculated), the Sixth Circuit held that Crosby's action was not "truly equitable," and thus the district court lacked subject matter jurisdiction.

In reaching this conclusion, the Sixth Circuit specifically noted that Crosby had not attempted to amend his complaint in the district court to bring a claim under Section 502(a)(1)(B). The Court also noted that Crosby's appeal brief asserted he could not bring his claim under that section. For reasons that are not entirely clear to this Court, Crosby believed he was foreclosed from an action under Section 502 (a) (1)(B), a belief about which the Sixth Circuit stated: "We intimate no view as to whether this proposition is correct." *Crosby*, 382 F.3d at 591, n. 5.

ANALYSIS

Defendant's motion argues that this case must be dismissed because the Plaintiffs here, like Crosby, are seeking money damages and so cannot bring a claim under §502(a)(3). Defendant also argues that because Plaintiffs allege that the AK Steel Plan violates ERISA, they are not seeking benefits "under the terms of the plan" for purposes of Section 502 (a)(1)(B), and thus Plaintiffs cannot bring any claim at all. Indeed, Defendant's Reply specifically argues-

that Plaintiff West just waited "too long" to complain about his lump sum distribution, and so he should be barred from recovery.[31]

Defendant's argument ignores the basis for this Court's previous grant of partial summary judgment to Plaintiff. This Court has already found that the Plan plainly defines the term "accrued benefit" as a single life annuity commencing at normal retirement age. The Court rejected Defendant's argument that the projection rate for a participant's account is controlled by the ERISA statute, rather than by the plain terms of the Plan. Clearly, Plaintiffs are "participants" in the Plan, and they are seeking Plan benefits "under the terms of the Plan." The fact that they challenge the section of the Plan concerning the lump sum benefit calculation does not, and should not, doom their claim.

More importantly, the Plaintiffs in this case, unlike Mr. Crosby, expressly bring their claims under Sections 502(a)(1)(B) and (a)(3). Comp. ¶ 1. The Complaint is styled "Class Action Complaint for Damages and Other Relief." Nothing in *Crosby* suggests that this alternative pleading for relief is now impermissible. To the contrary, *Crosby* confirms long-standing law; in fact Defendant noted in its own motion for judgment on the time-bar issue that Plaintiff could not recover money damages under Section 502(a)(3). (See Doc. 20, p. 6 at n. 3.) Plaintiffs

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[31] This Court previously denied Defendant's motion for entry of judgment because Plaintiffs' claim is time-barred (Doc. 51). Defendant does not argue that Plaintiffs' claim is barred by the applicable statute of limitations.

may, however, obtain declaratory relief under that section. Nothing in *Knudson* or *Crosby* suggests that plan participants are barred from seeking a judgment that the plan violates ERISA and the consequent recovery of the correct amount of plan benefits under Sections 502 (a)(1)(B) and (a)(3).

But, Defendant now argues, Plaintiffs cannot maintain a claim under Section 502(a) (1) (B) either because Plaintiffs are not seeking a judgment under the Plan as it is written. Defendant cites several cases in support of its newfound argument. Defendant's cases are simply not relevant to the facts of this case. For example, in *Fraser* v. *Lintas*, 56 F.3d 722 (6th Cir. 1995) a fiduciary duty when it made a distribution to her without fully advising her of the potential tax consequences. She sought compensatory damages. Her claim plainly was not one for benefits under the terms of the plan. Similarly, in *Hughes* v. *General Motors Corp.*, 852 F.2d 568 (6th Cir. July 14, 1988) (unpublished), the plaintiff employees claimed they had relied on their employer's allegedly false oral assurances in opting for early retirement, when the employer knew at the time it would be offering enhanced benefits in the very near future and did not disclose that fact to the employees. The employees sued to obtain those enhanced benefits, but the court held they could not bring a § 502(a)(1)(B) a plan participant's ex-wife claimed that the plan breached claim because they were unquestionably not participants or beneficiaries of that new plan.

Defendant also cites *Ramsey* v. *Formica Corp*, 2004 WL 1146334 (S.D. Ohio April 6, 2004), involving an unfortunate situation of unintended overpay-

ment of benefits to plan participants. When the employer discovered the error, it notified the participants of a reduction in their benefits. Those employees then sought a preliminary injunction to prevent the reduction, which this Court denied. The terms of the plan were not violated by the reduction (indeed, the overpayments violated the plan). Plaintiffs freely admitted they were not entitled under the plan to the overpaid benefits they had been receiving. This Court therefore concluded that plaintiffs had not established the likelihood of success on the merits of a Section 502(a)(1)(B) claim.

Here, Plaintiffs contend that they are entitled to additional lump sum benefits under the terms of the Plan, because the Plan's treatment of lump sum payments violates ERISA. To accept Defendant's argument that Plaintiffs, cannot bring any claim, would in effect permit plan terms that blatantly violate ERISA to stand unchallenged, because once the benefits were paid, participants could not bring a claim under § 502 (a) (1) (B) for benefits "under the terms of the plan." As noted in *Clair* v. *Harris Trust*, 190 F.3d 495,498 (7th Cir. 1999), another case cited by Defendant, such a conclusion would leave a "big gap in ERISA's remedial scheme." Other courts have permitted claims very similar to Plaintiffs' claims here to proceed. See, e.g., *Esden* v. *Bank of Boston*, 229 F.3d 154 (2nd Cir. 2000), noting that plaintiff brought her claim under both Sections 502(a)(1)(B) and (a)(3) seeking money damages and an order barring the plan from using the challenged lump sum calculation method; and *Berger* v. *Xerox Corp. Retirement Income Guarantee Plan*, 338 F.3d 755 (7th Cir. 2003), where the Seventh Circuit sensibly de-

scribed plaintiffs' claim as one for declaratory relief, from which a recalculation and award of benefits would, hopefully, naturally flow.

CONCLUSION

For all of the foregoing reasons, Defendant's Motion to Dismiss Plaintiffs' Claims under *Crosby* v. *Bowater* (Doc. 58) denied.

DATED: November 22, 2004

s/ Sandra S. Beckwith
Sandra S. Beckwith,
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

JOHN D. WEST, on behalf of himself and all others similarly situated,

Plaintiff,

v.

AK STEEL CORPORATION (formerly Armco Inc.) RETIREMENT ACCUMULATION PENSION PLAN, et al.

Defendants.

No. 1:02-cv-0001

March 29, 2006

AMENDED FINAL JUDGMENT

On March 9, 2004, the Court entered an order granting Plaintiffs' motion for class certification. (Doc. 55) The Court certified a class defined as:

> All Vested participants in the AK Steel Corporation (formerly Armco Inc.) Retirement Accumulation Pension Plan who retired or were terminated from employment on or after January 1, 1995 and received their pension benefits under the Plan in the lump sum form of payment.

On April 8, 2004, the Court granted partial summary judgment to Plaintiff, finding that the method Defendants used to calculate Plaintiff's lump sum retirement payments violated certain provisions

of ERISA. (Doc. 56) The Court subsequently ordered that 92 individuals included in the original class certification were excluded from the class, based upon their execution of releases in connection with a reduction in force. (Doc. 119) The Court also ordered that certain individuals who had initially chosen to opt out of the class were to be included in the certified class. (Doc. 128) On December 19, 2005, the Court determined the manner by which to calculate the amounts due each class member, and determined the rate and time from which prejudgment interest should be computed. (Doc. 129)

On January 18, 2006, pursuant to the Court's order, the parties jointly filed under seal an agreed roster of the current class members and the amount due to each member, calculated under the terms of the Court's December 19, 2005 Order. (Doc. 134) Pursuant to that roster, the total amount of damages to be awarded to the Class is $37,638,442.79.

In accordance with the Court's previous order concerning prejudgment interest, the Court finds that prejudgment interest accrues from April 16, 2001 at the weekly average one year constant maturity Treasury yield, pursuant to 28 U.S.C. §1961(a), using the rate from the week preceding the entry of judgment. That rate for the week ending February 17, 2006 according to the Federal Reserve's website, is 4.70%.[32] Therefore, the Court awards prejudgment interest to each class member at the rate of 4.7%, accruing from the **later** of (1) April 16, 2001 or (2) the

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[32] http://www.federalreserve.gov/releases/h15/current/ accessed on February 21, 2006

date on which that class member received his or her lump sum distribution.

The Court is required to award a prevailing plaintiff postjudgment interest, at the rate defined by 28 U.S.C. §1961(a), on the total judgment inclusive of prejudgment interest. *Caffey* v. *UNUM Life Ins. Co.*, 302 F.3d 576, 585 (6th Cir. 2002). Accordingly, postjudgment interest shall accrue at the rate of 4.70% per annum on the total judgment until the date the judgment is paid in full by Defendants.

Therefore, in accordance with the Court's previous orders, the Court awards Plaintiffs $37,638,442.79 in damages, plus prejudgment interest according to the formula set forth above. Postjudgment interest shall accrue on the total amount of the judgment at the rate of 4.70% per annum until paid. Pursuant to Rule 54(d)(1) of the Federal Rules of Civil Procedure, Defendants shall pay the court costs of this litigation.

IT IS SO ORDERED.

DATED: March 29, 2006

/s/
Sandra S. Beckwith,
Chief Judge
United States District
Court

ERISA § 502(a), (e), 29 U.S.C. § 1132(a), (e)

Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [*29 USCS § 1109*];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [*29 USCS § 1025(c)*];

(5) except as otherwise provided in subsection (b) by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such vio-

lation or (ii) to enforce any provision of this title;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), or (7) of subsection (c) or under subsection (i) or (1);

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 609(a)(2)(A) [*29 USCS § 1169(a)(2)(A)*]);

(8) by the Secretary, or by an employer or other person referred to in section 101(f)(1) [*29 USCS § 1021(f)(1)*], (A) to enjoin any act or practice which violates subsection (f) of section 101 [*29 USCS § 1021(f)*], or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title [subtitle] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract

or annuity, plus reasonable prejudgment interest on such amounts.

* * *

(e) Jurisdiction.

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 101(f)(1) [*29 USCS § 1021(f)(1)*]. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

ARMCO INC.

RETIREMENT ACCUMULATION PENSION PLAN

Effective January 1, 1995

and as Further Amended Effective July 1, 1995

ARTICLE I

DEFINITIONS

In the Plan, whenever the context so indicates, the singular or plural and the masculine, feminine or neuter gender shall each be deemed to include the others; the terms "he", "she", "his", "her" and "him" shall refer to an Employee, Eligible Employee, Participant or Beneficiary; reference to a Section of the Code or ERISA or any Regulation issued thereunder shall include any subsequent amendments to such Section; reference to an Article or Section heading shall not affect its meaning or interpretation; and the following terms shall have the meanings set forth below:

1.1 "Account" or "Accounts" means the Account or Accounts established and maintained for each Participant pursuant to the provisions of Article III, including Future Accounts and Opening Accounts (if applicable). The value of the Account shall not reflect the value of the Pre-62 30-Year Annuity. All Accounts are intended to be only bookkeeping accounts and neither the maintenance thereof nor the making of credits thereto shall be construed as an allocation of assets of the NCPP to, or a segregation of such assets in, any such Account, or otherwise as

creating a right in any person to receive specific assets of the NCPP.

1.2 "Accrued Benefit" means the Accounts payable in the form of a single life annuity commencing on a Participant's Normal Retirement Date (or, if later, such Participant's actual retirement date) that is the Actuarial Equivalent of the Participant's current Account. The Account is projected to Normal Retirement Date and converted to a single life annuity using the factors set forth in Exhibit I. This single life annuity shall b determined by dividing the then current value of such Participant's Account by the applicable factor as described in Section A of Exhibit I.

1.3 "Actuarial Equivalent" or "Actuariaily Equivalent" for any specified annuity or benefit means another annuity or benefit, commencing at a different date and/or payable in a different form than the specified annuity or benefit, but which has the same present value as the specified annuity or benefit, using the applicable factors described in Exhibit I.

1.4 "Adjustment Factor" means the cost of living adjustment factor prescribed by the Secretary of the Treasury under Code Section 401(a)(17)(B) or Code Section 415(d) applied to such Plan provisions in such manner as the Secretary shall prescribe.

1.5 "Adjusted Accrued Benefit" has the meaning set forth in Section 3.1.

1.6 "Affiliate" means any corporation which is included in a controlled group of corporations (within the meaning of Code Section 414(b)) which includes the Company, any trade or business

(whether or not incorporated) which is under common control with the Company (within the meaning of Code Section 414(c)), any organization included in the same affiliated service group as the Company (within the meaning of Code Section 414(m)), or any other entity required to be aggregated with the Company pursuant to the Regulations under Code Section 414(o). For purposes of applying the provisions of Articles XII and XIV, Code Section 415(h) shall apply in determining an "Affiliate".

1.7 "Beneficiary" means the person or persons or other legal entity who has been designated in Section 5.2 to receive any benefits payable upon the death of a Participant.

1.8 "Benefit Commencement Date" means (i) for an annuity form of distribution, the fast day of the first period for which an amount is payable as a benefit pursuant to the Plan, and (ii) for a lump sum payment, the date on which payment is made pursuant to the Plan.

1.9 "Board of Directors" means the Board of Directors of the Company.

1.10 "BPAC" means the Benefit Plans Administrative Committee appointed by the Board of Directors.

1.11 "'Break In Continuous Service" has the meaning set forth in the Section 8.3.

1.12 "Code" means the Internal Revenue Code of 1986, as amended.

1.13 "Company" means Armco Inc., an Ohio corporation.

1.14 "Continuous Service" has the meaning set forth in Section 8.1.

1.15 "Corporate Group" means the Company and each Affiliate. For the purposes of determining whether an employee of another company is an Employee and the length of his Continuous Service, each company shall be included in the "Corporate Group" only for such period or periods during which such company is an Affiliate or is otherwise required to be aggregated.

1.16 "Divested Unit" means a business of the Company (whether organized and operated as a division, a subsidiary or a division of a subsidiary) which has been sold or transferred as a going business to a third party (including a corporation, partnership or joint venture) not related to the Company or to a corporation, partnership or joint venture partly, owned by the Company or an Affiliate which is not itself an Affiliate, regardless of whether the sale or transfer is accomplished by means of a sale or transfer of the stock or by means of a sale or transfer of assets.

1.17 "Eligible Employee" means:

(a) any person who is employed by or paid through the payroll of an Employer as a salaried employee whose principal duties are in the United States or who is a United States citizen employed abroad, and whose terms and conditions of employment art not the subject of a collective bargaining agreement;

(b) hourly-paid Employees of the Employer working at the Coshocton Operations who were hired on or after January 1, 1994 in accordance with Appendix 1; or

(c) hourly-paid employees of the Employer working at the Coshocton Operations who elected to participate in the RAPP as of July 1, 1995 in accordance with Appendix 1;

but in each case excluding:

(1) any person represented by a recognized collective bargaining representative who has entered into a collective bargaining agreement which does not provide for participation under the Plan if pension benefits were a subject of good faith bargaining;

(2) any Leased Employee; and

(3) any foreign national working in the United States; and

(4) any Employee who was on idle time as of December 31, 1994 and who does not return to work for an Employing. Company.

1.18 "Eligibility Service" has the meaning set forth in Section 2.4.

1.19 "Employee" means each common law employee employed by an Employer or any Affiliate and each Leased Employee.

1.20 "Employer" or "Employing Company" means the Company and any other Affiliate as identified on Schedule 1 whose Employees are designated as Participants in the RAPP and which Affiliate adopts the RAPP in accordance with the procedures set forth herein. The term "Employs" or "Employing Company" shall not include any separate operating division or business unit which is purchased or oth-

erwise established by an Employer after January 1, 1995 until and unless the Eligible Employees of such division or unit are designated as Participants in the RAPP.

1.21 "ERISA" means the Employee Retirement Income Security Act of 1974, as amended.

1.22 "Future Account" means the Account established for each Participant under Section 3.2.

1.23 "Hour of Service" has the meaning set forth in Section 2.4.

1.24 "Interest Credit Percentage" has the meaning set forth in Section 3.3.

1.25 "Layoff" means an involuntary, temporary discontinuance of employment under a written layoff policy that, at the time of discontinuance, is either declared by the Employer to be temporary or is reasonably believed by the Employer at the time of the initial layoff to be temporary, and shall include voluntary layoff status which an Employee elects in lieu of immediate termination of employment as a matter of right under written Employer policies regarding layoff status.

1.26 "Leased Employee" means any person who pursuant to an agreement between the Employer and a leasing organization has performed services for the Employer on a substantially full time basis for a period of at least 1 year and such services are of a type historically performed by employees in the business field of the Employer. Contributions or benefits provided by the leasing organization which are attributable to services performed for the Employer shall be treated as provided by the Employer.

1.27 "NCPP" refers to the Armco Inc. Noncontributory Pension Plan, originally effective January 1, 1950 and as in effect on January 1, 1995, and shall include the RAPP as a separate cash balance formula. Any reference in this Plan document to the NCPP shall not include the RAPP except where otherwise expressly provided.

1.28 "Normal Retirement Age" means the later of age 65 or the age of the Participant upon the 5th anniversary of his initial participation in the Plan.

1.29 "Normal Retirement Date" means the first day of the month coincident with or next following the date on which a Participant attains Normal Retirement Age.

1.30 "Opening Account" means the Account established under Section 3.1 for certain Employees who were Participants in the NCPP on December 31, 1994 and who became Plan Participants on January 1, 1995.

1.31 "Participant" means an Eligible Employee or former Eligible Employee who has qualified for participation in accordance with the terms of Article II who has not received a distribution of his entire Account under the RAPP.

1.32 "PBGC" means the Pension Benefit Guaranty Corporation.

1.33 "Pension Fund" means the assets of the NCPP held in the Trust to fund the benefits in the Plan.

1.34 "Pensionable Earnings" means base salary (prior to deferrals made under Code Sections 125 and 401(k)), plus salary continuation payments,

premiums for overtime worked (overtime premiums, Sunday premiums, holiday pay for holidays worked or not worked, and shift pay) and cash payments under performance incentive plans, profit sharing, gain sharing, lump-sum merits and lump-sum special recognition awards and excluding all other forms of compensation, taxable fringe benefits and severance pay. Payments of any kind made after the end of the month in which a Participant incurs a Break in Continuous Service or is placed on idle time shall not constitute Pensionable Earnings.

Pensionable Earnings in a Plan Year in excess of $150,000 (subject to the Adjustment Factor) shall be disregarded for all purposes under the RAPP. In determining the Pensionable Earnings of an Employee, the rules of Code Section 414(q)(6) shall apply, *except that in applying such rules, the term "family" shall include only the Spouse of the Employee* and lineal descendants of the Employee who have not attained age 19 before the close of the year. If, as a result of the application of such rules, the adjusted dollar limitation of Code Section 401(a)(17) applicable to family members is exceeded, then such limitation shall be prorated among the affected individuals in proportion to each such individual's Pensionable Earnings as determined under this Section prior to the application of the limitation.

1.35 "Permanent Disability" or "Permanently Disabled" means any physical or mental condition that is certified by a physician selected by the Employer as being a total and permanent disability rendering the person unable to perform any job within the Employer which such person is, in the Employer's sole discretion, reasonably suited to perform

by education or experience. Alcoholism or drug addiction shall not be or be deemed to be a physical disability under the Plan but the mental or physical condition resulting from any such addiction may qualify if duly certified.

1.36 "Permanent Shutdown" means the total and permanent closing of a major steel making, manufacturing or fabrication facility of the Company or other Employing Company or a significant department of such facility which involves the Layoff or termination of employment of a significant number of Employees, determined without regard to whether or not such action is a Permanent Shutdown within the meaning of any basic labor agreement; or, when expressly provided in a basic labor agreement, the permanent closing of a plant, department or division which is agreed to be a Permanent Shutdown (or which is otherwise found under the applicable claims procedure to be a Permanent Shutdown, provided that such finding shall apply only with respect to the Employees covered by such basic labor agreement).

Except as may otherwise be required by the terms of a basic labor agreement, an Employee (i) whose job is eliminated, (ii) who is displaced from his job by reason of a force reduction, (iii) who refuses a transfer of employment, or (iv) who voluntarily terminates his employment or voluntarily retires after the effective date of a Permanent Shutdown but before his employment is involuntarily terminated by an Employing Company, shall be deemed to have voluntarily terminated employment and not to have lost his employment as a result of a Permanent Shutdown for an purposes under the Plan including,

but not limited to, eligibility for a pension under Sections 4.5 and 4.6.

Except as expressly agreed with respect to Employees covered under a basic labor agreement or as established by the Board of Directors or BPAC, neither the sale or transfer of a business, the closing of all or any part of a business following its sale or transfer, nor the outsourcing of all or a substantial part of the work performed by a department or staff function, shall be considered to be a Permanent Shutdown.

1.37 "Plan" means the RAPP. Any reference to the Plan in this plan document shall refer solely to the RAPP except where specific reference is made to the NCPP.

1.38 "Plan Year" means the calendar year.

1.39 "Pre-62 30-Year Annuity" has the meaning set forth in Section 4.3.

1.40 "Preretirement Survivor Annuity" has the meaning set forth in Section 5.1.

1.41 "Qualified Election" has the meanings set forth in Sections 5.2 and 6.5.

1.42 "Qualified Joint and Survivor Annuity" and "Qualified Survivor Annuity" has the meanings set forth in Section 5.2 and Section 6.5.

1.43 "RAPP" means the Armco Inc. Retirement Accumulation Pension Plan, which is a ash balance benefit formula plan constituting part of the NCPP, the terms of which are set forth in this plan document. Any reference in this plan document to the RAPP shall not include any reference to the NCPP except where specific reference is made to the NCPP.

1.44 "RAPP Benefit" means a lump sum payment or a series of monthly payments which are payable to a person who is entitled to receive benefits under the RAPP.

1.45 "Retirement" or "Retire" means and shall be considered to occur.

(a) in the case of a Participant who applies for a RAPP Benefit prior to incurring a Break in Continuous Service, on the date he wishes to retire which shall be a date on or after the latest of:

(1) the date of his request for retirement;

(2) the date of his attainment of eligibility for a RAPP Benefit; or

(3) the last day for which he received Pensionable Earnings from an Employing Company, but not later, than the last day of his Continuous Service; or

(b) in the case of a Participant who applies for a RAPP Benefit after incurring a Break in Continuous Service, on the later of (i) the last day of his Continuous Service, or (ii) the day he becomes eligible for a RAPP Benefit.

1.46 "Spouse" or "Surviving Spouse" means the spouse or surviving spouse of a Participant. To the extent provided under a qualified domestic relations order as defined in Code Section 414(p), the term shall include a former spouse.

1.47 "Spousal Consent" has the meanings set forth in Section 5.2 and Section 6.5.

1.48 "Trust" means the Armco Master Pension Trust, as amended from time to time, or such other one or more trusts, or any successor trust or trusts established by the Company under which any assets of the NCPP or income thereon may be held, invested or reinvested to effectuate the purposes of the NCPP.

1.49 "Year of Eligibility Service" has the meaning set forth in Section 2.4.

* * *

ARTICLE III

ACCOUNTS AND CREDITS TO ACCOUNTS

3.1 *Opening Accounts*

A Participant who participated in the NCPP immediately prior to January 1, 1995 shall have an Opening Account, in addition to a Future Account established under Section 3.2. Such Participant's Opening Account as of January 1, 1995 shall be determined as follows: the Participant's Adjusted Accrued Benefit as of December 31, 1994 under the NCPP shall be multiplied by 115 to create a lump sum value at age 62. Such value shall then be discounted from age 62 for each year and part thereof that the Participant's age at January 1, 1995 precedes the Participant's 62nd birthday, on the basis of an interest rate assumption of 7.5%. If a Participant is older than age 62 on January 1, 1995, the Adjusted Accrued Benefit as of December 31, 1994 under the NCPP shall be multiplied by the factors set forth on Exhibit 2 to create a lump sum value.

A Participant's Adjusted Accrued Benefit is the greater of (i) the frozen accrued benefit under the NCPP as of December 31, 1994 with earnings limited to $150,000 for 1994 and all prior years or (ii) the sum of (1) the accrued benefit under the NCPP as of December 31, 1993 frozen in accordance with Treas. Reg. Section 1.401(a)(4)-13 and (2) the accrued benefit under the NCPP from January 1, 1994 through December 31, 1994 with earnings limited to $150,000.

3.2 *Future Accounts*

As of the last day of each calendar quarter beginning on and after January 1, 1995, there shall be credited to each Participant's Future Account an amount, based on the Participant's attained age and Continuous Service (as determined under Articles 9 and 10 of the NCPP) as of December 31, 1994 equal to his Pensionable Earnings multiplied by the following applicable percentage:

Age at 12/31/94	*Continuous Service as of 12/31/94*					
	0-4	5-9	10-14	15-19	20-24	25+
Under 40	2%	3%	4%	5%	6%	N/A
40-49	3%	4%	5%	6%	7%	8%
50+	4%	5%	6%	7%	8%	9%

The applicable percentage for Participants who were participants in the 2% Defined Contribution Pension Plan as defined in Section 2.1 as of December 31, 1994 or who were hired after December 31, 1994 shall be 2%.

3.3 *Interest Credits To Accounts*

The Accounts off each Participant shall be increased by the pro-rated portion of the Interest Credit Percentage for the applicable calendar year times the Participant's Future Account and the Opening Account (if applicable). Such crediting shall take place as of (i) the end of each calendar quarter

after December 31, 1994 on the balance at the beginning of the quarter and (ii) the Benefit Commencement Date.

Interest credits on Future Accounts shall cease on a Participant's Benefit Commencement Date. Interest credits on Opening Accounts shall cease at the earlier of the participant's attainment of age 65 or Benefit Commencement Date.

Subject to the minimum and maximum percentages, the Interest Credit Percentage for each calendar year shall be equal to the rate, on the November 30 of the prior calendar year, on Treasury Constant Maturities, 5-year, as published in the Federal Reserve Statistical Release H.15(519) of the Board of Governors of the Federal Reserve System. In no event shall the Interest Credit Percentage for Future Accounts be less than 3% or greater than 12.5%. In no event shall the Interest Credit Percentage for Opening Accounts be less than 7.5% or greater than 12.5%.

ARTICLE IV

RAPP BENEFITS

4.1 *Normal Retirement Benefit*

Subject to the minimum protected benefits described in Section 4.8, a Participant may Retire on or after his Normal Retirement Date and receive a RAPP Benefit payable in accordance with Article VI in one of the following payment options:

(a) Full lump-sum payable on his Benefit-Commencement Date equal to his Accounts;

(b) Full annuity beginning on his Benefit Commencement Date equal to the Actuarial Equivalent of his Accounts; or

(c) Partial lump-sum and partial annuity payable or beginning on his Benefit Commencement Date equal to the respective pro-rata amounts determined under (a) and (b) above.

4.2 *Early Retirement Benefit*

A Participant who has not attained age 65 may Retire on or after attainment of age 55 and after completion of at least 15 years of Continuous Service and receive a RAPP Benefit payable in any of the payment options described in Section 4.1.

4.3 *30-Year Retirement*

(a) A Participant who was a Participant in the NCPP prior to December 31, 1994 and who has not attained age 62 may retire on or after completion of 30 years of Continuous Service and receive a Pre-62 30-Year An-

nuity which is the Actuarial Equivalent of the Regular 1.1/1.2% Pension accrued under the NCPP as of December 31, 1994. Such benefit is payable as of the first full calendar month of Retirement and is payable in addition to any Early Retirement Benefit described in Section 4.2 and without regard to election of any payment option described in Section 4.1 for RAPP Benefits and shall cease on the date the Participant attains age 62.

(b) In the event of the Participant's death prior to age 62, the following benefits will be paid to the Participant's Beneficiary commencing with the first full calendar month following the Participant's death and ceasing when the Participant would have attained age 62:

(1) if the Participant died prior to Retirement, 50% of the Pre-62 30-Year Annuity; or

(2) if the Participant died after Retirement, 100% of the Pre-62 30-Year Annuity.

* * *

ARTICLE X

PLAN ADMINISTRATION

10.1 *Powers of the Benefit Plans Administrative Committee*

BPAC is a named fiduciary of the Plan with the general responsibility, full discretionary authority and the power to administer and construe the provisions of the Plan, to determine in its discretion any questions of law or fact arising under the Plan, to determine in its discretion the amount of and to authorize the payment of benefits properly due under the Plan, to maintain Plan records, to, adopt amendments to the Plan in accordance with Section 11.1 and to exercise such other rights and powers as may be specifically granted to herein or by the Board of Directors. The foregoing grant of authority is in addition to, and not in limitation of, the powers granted to BPAC by the Board of Directors in its delegation of authority creating BPAC.

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EXHIBIT 1

ACTUARIAL EQUIVALENCE FACTORS FOR THE RETIREMENT ACCUMULATION PENSION PLAN

A. Factors for Converting an Account into a Life Annuity Benefit

The interest factor used in converting a Future Account into an annual life annuity shall be the 12-month average, rounded to the nearest 0.25%, using the 12/31/z-2 through 11/30/z-1 rates preceding the year of the conversion (z) on 10-year Treasury Bonds, as published in the Federal Reserve Bulletin. The interest factor used in converting an Opening Account into an annual life annuity shall be 7-1/2%. The mortality table shall be the 1971 Group Annuity Mortality Table, for males, projected to 1978, with scale E.

B. Factors for Converting the Life Annuity Benefit Payable to the Participant into an Actuarial Equivalent Benefit under Other Forms of Payment under the Plan

1. Conversion factor for a spouse beneficiary joint and survivor option under Section 6.5(b):

The conversion factor for a 50% survivor benefit shall be .95, reduced by 1/2% for each year in excess of five that the beneficiary is younger than the Participant, or increased by 1/2% for each year in excess of five that the beneficiary is older than the Participant, up to 100% measured on the basis of age on the Benefit Commencement Date.

2. Conversion factor for a co-pensioner option under Section 6.6(b):

The conversion factor for a 50% survivor benefit shall be .95, reduced by 1/2% for each year in excess of five that the beneficiary is younger than the Participant, or increased by 1/2% for each year in excess of five that the beneficiary is older than the Participant, up to 100% measured on the basis of age on the Benefit Commencement Date.

The conversion factor for a 100% survivor benefit shall be .85, reduced by 1% for each year in excess of five that the beneficiary is younger than the Participant, or increased by 1% for each year in excess of five that the beneficiary is older than the Participant, up to 100% measured on the basis of age on the Benefit Commencement Date.

3. Conversion factor for a full cash refund annuity under Section 6.6(a):

The conversion factor shall be 0.95.

C. Assumptions for Other Calculations, including Minimum Protected Benefits

Actuarial Equivalent calculations under the Plan shall use the Applicable Interest Rate and the Applicable Mortality Table. These assumptions shall not be used with respect to lump-sum distributions of a Participant's Account balance.

For purposes of this Exhibit, the "Applicable Mortality Table" is the mortality table based on the prevailing commissioners' standard table (described in Code Section 807(d)(5)(A)) used to determine reserves for group annuity contracts issued on the date as of which present value is determined (without re-

gard to any other subparagraph of Code Section 807(d)(5)), that is prescribed by the Commissioner of the Internal Revenue Service in revenue rulings, notices, or other guidance, published in the Internal Revenue Bulletin.

For purposes of this Exhibit, the "Applicable Interest Rate" for any distribution is the annual interest rate on 30-year Treasury securities as specified by the Commissioner of the Internal Revenue Service in revenue rulings, notices or other guidance, published in the Internal Revenue Bulletin, for the November immediately preceding the calendar year in which the annuity starting date occurs (resulting in a one year stability period).

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